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89- 1385

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
Term of October, 1989

MARCIA JONES,
Petitioner,

v.

HARRY PSIMOS,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

May the federal courts rewrite Indiana jurisprudence by approving, in an appellate malpractice case, an Indiana trial court's findings where those findings have no factual basis?

Is a plaintiff alleging appellate malpractice required to prove that the state appellate court would have reversed the trial court?

Does a federal court of appeals show lack of respect for state law in saying that a state appellate court would have upheld a lower court decision that ignores statutory mandates?

LIST OF PARTIES

The parties are the same as those listed in the caption to the case in this Court.

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REPORTS OF OPINIONS BELOW

1. *Jones v. Psimos*, 882 F.2d 1277, 1989 U.S. App. LEXIS 12570 (7th Cir. 1989)
2. *Jones v. Psimos*, 1989 U.S. App. LEXIS 14979 (7th Cir., September 26, 1989)

JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Seventh Circuit entered its order in *Jones v. Psimos*, No. 88-2913, affirming the judgment of the District Court for the Northern District of Indiana, on August 21, 1989. Petitioner timely filed a petition for rehearing on September 5, 1989, which was denied by order of the Court of Appeals on September 26, 1989. This court has jurisdiction to consider this case under 28 U.S.C. § 2101(c).

STATUTE INVOLVED

"In determining what is just and reasonable, the court shall consider the following factors:

(1) the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker;

(2) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift;

(3) the economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to

remain therein for such periods as the court may deem just to the spouse having custody of any children;

(4) the conduct of the parties during the marriage as related to the disposition or dissipation of their property;

(5) the earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties."

Ind. Code § 31-1-11.5-11.

STATEMENT OF THE CASE

This petition arises from the legal malpractice claim of Marcia Jones ("Marcia") against Harry Psimos ("Psimos"), her former attorney. Following the Indiana state court's property distribution order in Marcia's divorce case, Marcia retained Psimos to appeal the order. Psimos, telling Marcia that she had a good case, agreed to do so. When he failed to perfect the appeal, Marcia sued Psimos in federal court for legal malpractice. The basis for federal jurisdiction was diversity, as Marcia is an Indiana citizen and Psimos an Illinoisan. Psimos, arguing that Marcia would have lost an Indiana appeal even if he had perfected one, moved for summary judgment. The district court granted the motion, and the Court of Appeals for the Seventh Circuit affirmed.

Factual Background

Marcia was married for nine years to Edward L. Jones ("Edward"). When Edward initiated divorce proceedings against her in February, 1982, Marcia

hired Psimos to represent her. On November 23, 1982, the Circuit Court of Jasper County, Indiana entered an order dissolving the marriage. The question of property distribution was reserved, however, and discovery conducted.

During the marriage, the principal source of income was the couple's business, Jones Shell, a service station. Part of Marcia's presentation to the Jasper County court was that Edward had skimmed off and hidden large amounts of monies derived from the operation of Jones Shell, and from various stock and commodities accounts in which Edward had an interest. Marcia, naturally, wanted the Jasper County court to consider these funds in making its property distribution.

During four days of trial in the summer of 1983, the court heard considerable evidence of the value of various assets belonging to Marcia and Edward, and how they had disposed of the property. In pertinent part, the value of Jones Shell was estimated at between $100,000 and $150,000 (Transcript of

Proceedings ("Tr.") at 809). Marcia asserted that Edward had concealed numerous assets, testifying that she had seen bags of money from his business about three times a week in their home (Tr. at 701).

The evidence was uncontested that Edward bought 750 shares of stock in American Surgery Center in June of 1981 at a cost of $1.25/share, or $937 (Tr. at 216). Marcia introduced evidence that in June of 1983, the value of that stock had risen to 16-3/8 per share, or $12,270.

During the hearing, the Jasper County court, Judge Daugherty presiding, refused to consider the evidence as to hidden assets. The court stated:

> . [W]hat I've gotta do is divide up these parties' marital, or marital property, and what they've spent or what they've disposed of during the course of their marriage is, is really not relevant. . . . [W]hat either of these parties purchased during their marriage is really [of] no relevance to

> the court, and only, I think, adds to pile on more information that is of no relevance at all.

(Tr. 585, 601).

On January 25, 1984, the court entered an order distributing the property. The order stated, *inter alia*, that

> [E]ach of the parties spen[t] a considerable amount of time attempting to prove that the other party was secreting assets. . . . The Court finds from the testimony that said allegations of secreting assets are probably true as to both parties, but also finds that the assets secreted by each party were of equal value and is [*sic*] not a matter that the Court will consider in its final decision.

(Appendix ("App.") 36).

Following Psimos's unsuccessful attempts to have the order reconsidered, Marcia asked Psimos to take an appeal of the property distribution order. Psimos

wrote Marcia a letter, agreeing to take the appeal, in which he stated that "there is error in the record and the possibility of reversal is good." Psimos, however, failed to take the necessary steps to perfect the appeal, and it was dismissed by the Indiana Appellate Court.

Following the dismissal of her state court appeal, Marcia brought legal malpractice proceedings against Psimos in the United States District Court for the Northern District of Indiana. Psimos filed a motion for summary judgment. The question was briefed by both parties.

Marcia also filed, on February 17, 1988, a motion for leave to amend her complaint to include a count of constructive fraud. Psimos filed a memorandum in opposition on February 26, 1988.

The district court on August 18, 1988 granted Psimos' motion for summary judgment. The district court acknowledged that Judge Daugherty's order does not reflect the value that he assigned to numerous valuable assets of Edward (App. 26). Nevertheless, the district court said it would

"assume," therefore, that the assets were of nominal value (*Id.*). The court held, without discussion, that Judge Daugherty's finding as to the existence and equality of concealed assets satisfied the requirements of the Indiana Code that a court consider the parties' disposition or dissipation of property during the marriage (App. 27). In summary, the district court found that Marcia was unable to show that but for her attorney's negligence, the resolution of her appeal would have been more favorable, and that therefore, she could not sustain a claim for legal malpractice under Indiana law.

The court entered a separate order denying Marcia's motion for leave to file her amended complaint.

Marcia appealed to the United States Court of Appeals for the Seventh Circuit. On August 21, 1989, the Court of Appeals affirmed the two August 18, 1988 District Court orders (App. 1-17). The appellate panel, stating that it had to put itself in the shoes of the Indiana appellate court that would have heard the

appeal had Psimos duly perfected it, held that Judge Daugherty's orders were not an abuse of discretion. Marcia filed a petition for rehearing, but on September 26, 1989, the appellate panel denied rehearing (App. 43). This petition followed.

ARGUMENT

I. A Finding of Fact Without Any Rational Basis Constitutes Abuse of Discretion.

While all parties agree that the applicable standard for review is "abuse of discretion," the Seventh Circuit insufficiently examined what, by Indiana law, constitutes such abuse. That the trial court has discretion does not mean that whatever it decides is correct. Its decision, first of all, must be a "reasonable and informed decision." *In re Marriage of Rupp*, 449 N.E.2d 1164, 1167 (Ind. App. 1983). A court abuses its discretion where its decision is "clearly against the logic and effect of facts and circumstances before the court including any reasonable inferences that may be drawn

therefrom." *Hunter v. Hunter*, 498 N.E.2d 1278, 1293 (Ind. App. 1986).

The Seventh Circuit panel candidly admits that "the record . . . provid[es] very little real evidence from which the trial court could make an accurate evaluation of the couple's assets, secreted or otherwise." (App. 14) This is exactly what Marcia argued: that there was no rational basis for the Jasper County finding that she hid assets in amounts equal to Edward's concealed assets. The Seventh Circuit opinion, however, then comes to an amazing *opposite* conclusion, saying that an Indiana appellate court could not have found the judge's determination to be an abuse of discretion.

To arrive at this conclusion, the Seventh Circuit opinion, like Edward's brief to the Court of Appeals, is forced to gloss over the Jasper County court's findings that Marcia also concealed assets, and that her concealed assets were equal to Edward's. The appellate opinion inaccurately states that "the record implies only that Mr. Jones kept the service station's

bank deposit bag in a safe in the Joneses' home" (App. 13). This is not the picture the record paints.

Marcia testified that from November, 1981 until March of 1982, about two or three times a week, Edward began bringing home bags of money from the service station, in amounts she had never seen before. She testified that she counted the money and found a bag to contain $10,000 in cash, and that from the size of the other bags, they had about the same amount. This amount is consistent with Edward's testimony that he might have over $14,000 in the service station's cash drawer at a given time (Tr. 233). If, as Marcia testified, Edward brought home such bags during November, 1981 until February, 1982, when Edward filed the divorce petition, and if they contained an average of $10,000 apiece, then the amount skimmed from the business in such fashion could easily be hundreds of thousands of dollars.

The Seventh Circuit's hypothesis that the moneybags were simply on their way to the bank is a novel one that even Edward has never advanced.

Nothing in the record gives *any* reason to infer that the situation was anything but what Marcia testified.

The sole "evidence" advanced for support of the proposition that Marcia, too, was concealing assets, is the appellate panel opinion's mention of an organ sold by Marcia for $3000, and two checks cashed for a similar amount. No other item is even mentioned. Significantly, the Jasper County court itself made no mention of these two items in its order. In any event, though, neither the organ nor the two checks can constitute a "secreted asset."

Dissipation of a marital asset after the date of the petition filing is different than concealing property from a court making a property distribution. For example, Edward testified that he withdrew over $8000 from his Merrill Lynch account three days after the filing of his divorce petition (Tr. at 210), an amount that by itself more than offsets both of Marcia's two $3000 items, yet this withdrawal was not singled out by the court as a "concealed" asset. More important, the two $3000 items attributed to

Marcia were not singled out by the trial court, and provide no support whatsoever for a finding that any assets secreted by Marcia and Edward were "equal." Neither Edward nor the Seventh Circuit panel explain how these two items can possibly constitute "concealed assets."

In sum, the Jasper County court based its order on a finding that had no evidentiary basis. This ruling can only be characterized as a bald abuse of discretion. Nothing could be more elemental but that a trial court's factual findings must be based on facts in the record. The discretion of the trial court does not include the discretion to invent, to fabricate, or to mortice informational gaps with fiction, no matter how convenient. When, as here, a *basis* for the exercise of discretion is found to be erroneous, Indiana precedent dictates that the appellate court *must* reverse. *Moore v. Moore*, 482 N.E.2d 1176, 1181 (Ind. App. 1985).

The case would be different if the Jasper County court had said that it disbelieved Marcia's testimony

of the moneybags and other evidence. The county court did not do this, however: instead, to dispose of the issue, it "found," without any factual basis whatsoever, that (1) Marcia had hidden assets, and (2) that her hidden assets were in amounts equal to those of Edward. In implementing such a patchwork solution, the court substituted a convenient symmetry for the harder work of doing justice.

The only correct finding of the Seventh Circuit would have been that the failure of Psimos to perfect Marcia's appeal prevented the Indiana appellate court from correcting the Jasper County court's sloppy and unprofessional adjudication, and deprived Marcia of her day in court. Instead of following its duty to point out a factually unsound finding, the Seventh Circuit stretched facts beyond reason to make them fit within an "abuse of discretion" standard that Indiana courts themselves would not apply. This disregard for state law is such a deviation from established judicial procedure as to warrant the supervisory authority of this Court. To allow the decision to stand

will send the wrong message to the growing ranks of legal malpractitioners that to escape liability, they need only seek refuge in the federal courts.

II. A Plaintiff Alleging Legal Malpractice for Failure to Perfect an Indiana Appeal Need Not Prove that the Appellate Court Would Have Ordered Reversal.

The Seventh Circuit opinion wrongly reasons that if "the Indiana appellate court would not have reversed the property distribution order, then Ms. Jones has suffered no injury" (App. 9). This is not the law in Indiana. Outright reversal is not the only option available to an Indiana court of review, and would not have been the proper mode here. The Indiana Appellate Court, reviewing a property distribution or other judgment in divorce, has the power to remand with instructions "to conduct further hearings, and receive further evidence if necessary." *In re Marriage of Owens*, 425 N.E.2d 222, 225 (Ind. App. 1981).

Remand for further evidence would have been a viable and proper alternative solution, especially in view of the Indiana Appellate Court's recognition that the abuse of discretion standard "is imprecise," and that the trial court's discretion "should be guided by standards and procedures aimed at securing a more meaningful appellate review." *Lord v. Lord*, 443 N.E.2d 847, 850 n.4 (Ind. App. 1982). Thus the either/or conundrum posed by the Seventh Circuit is a false one, and erroneously sets too harsh a test for Marcia to meet.

III. Failure to Consider Relevant Factors Constitutes Abuse of Discretion.

The Jasper County Court stated that "[W]hat they've spent or what they've disposed of during the course of their marriage is, is really not not relevant." This approach to the Jones case constitutes a separate reversible error that, had Psimos perfected an appeal, would have resulted in a reversal in favor of Marcia.

The section of the Indiana Code that governs disposition of property in divorce proceedings provides, in pertinent part, that

> In determining what is just and reasonable, the court shall consider the following factors:
>
> (1) the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker;
>
> (2) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift;
>
> (3) the economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to remain therein for such periods as the

court may deem just to the spouse having custody of any children;

(4) the conduct of the parties during the marriage as related to the disposition or dissipation of their property;

(5) the earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

Ind. Code § 31-1-11.5-11.

Failure to consider one of these statutorily required factors, especially when complicated by a difficult factual record, *requires* a retrial. *In re Marriage of Salas*, 447 N.E.2d 1176, 1181 (1981). Here, the Jasper County court failed to consider several of the factors.

First, the court's statement that it would not consider the disposition of assets during the marriage as relevant could not fly more directly

counter to the express mandate of the Indiana statute. Despite the District Court's attempts to patch up the county court opinion, it is clear from the remarks of Judge Daugherty that all he would consider were the "fair market" values of assets provably linked to the date of filing the divorce. The failure to consider, e.g., possible hundreds of thousands of dollars in cash squirreled away by Edward, as well as other assets mentioned in the district court opinion (App. 37-39), requires retrial.

In addition, the failure to consider the value of the American Surgery stock at the time of the hearing was erroneous. While Edward has been vociferous in his insistence that the date of his filing the divorce petition is the only relevant date, the statute is equally clear that a court *must* consider economic circumstances of the parties "at the time the disposition of the property is to become effective." § 31-1-11.5-11(3). Clearly, an additional $12,000 affects the "economic circumstances" of Edward. Additionally, the potential of the stock to produce

dividends or to provide income from sale affects "the earnings or earning ability of the parties." § 31-1-11.5-11(5).

Since the Jasper County court did not consider required relevant factors, the only explanation for its finding is that the court considered irrelevant factors. Judge Daugherty's remarks and opinion demonstrate that he was simply tired of the matter and wished to dispose of it, and was punishing Marcia for the failure of her attorney to present a case in as neat a package as the court may have liked. The tone of the Seventh Circuit opinion indicates approval for such an emotional disposition, and adds its own overtones of contempt for the litigants, characterizing Marcia as wanting to "share in the booty" (App. 3). Consideration of the parties' animosities, however, is not within the factors listed in the statute; for the court to consider such irrelevancies in itself constitutes reversible error. *Moore v. Moore*, 482 N.E.2d 1176, 1180 (1985).

Thus the blatant failure of the county court to consider relevant factors, and its reliance instead on irrelevant factors, constituted clear reversible error. Had these questions been properly presented to the appellate court, that court would have had to require retrial. Unfortunately for Marcia Jones, the appellate court never had the opportunity to so rule.

WHEREFORE, Petitioner Marcia Jones asks this Court to grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, and to enter an order reversing the orders of the Court of Appeals entered on August 21, 1989 and September 26, 1989, and remanding the cause to the United States District

Court for proceedings consistent with the order of reversal.

Respectfully submitted,

Marcia A. Jones

By:_____
One of her attorneys

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APPENDIX

1. Opinion of United States Court of Appeals (7th Cir.), entered August 21, 1989 App.1
2. Order of summary judgment, U.S. District Court (N.D.Ind.), entered August 18, 1988 App. 18
3. Order denying leave to amend, U.S. District Court (N.D.Ind.), entered August 18, 1988 App. 42
4. Order, Jasper Circuit Court, entered January 25, 1984 App. 50
5. Order denying petition for rehearing, United States Court of Appeals (7th Cir.), entered September 26, 1989 App. 65

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2913

MARCIA JONES,

Plaintiff-Appellant,

v.

HARRY PSIMOS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
Civil No. H 84-755—Michael H. Mihm, *Judge.*

ARGUED MAY 17, 1989—DECIDED AUGUST 21, 1989

Before WOOD, JR., and POSNER, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

WOOD, JR., *Circuit Judge.* Defendant-appellee Harry Psimos represented Plaintiff-appellant Marcia Jones in divorce proceedings in the Indiana state courts. Dissatisfied with Mr. Psimos' professional performance, Ms. Jones invoked the district court's diversity jurisdiction and sued Mr. Psimos for legal malpractice.[1] Upon Mr. Psimos' motion the court below granted summary judgment against Ms. Jones. She now appeals.

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[1] Ms. Jones is a resident of Indiana, Mr. Psimos of Illinois.

I. FACTUAL BACKGROUND

A. Indiana Divorce Proceedings

Edward and Marcia Jones married on March 17, 1973. When Mr. Jones filed for divorce in February 1982, Ms. Jones retained Mr. Psimos to represent her. The Joneses' marriage was dissolved on November 23, 1982, but by agreement of both parties division of the couple's property was reserved for a later date. The parties thereafter engaged in discovery concerning the couple's marital assets and liabilities. The judge presiding over the Joneses' property distribution heard four days of testimony on the issue in the summer of 1983.

It appears that during the marriage Mr. Jones was self-employed, owning a service station, while Ms. Jones worked as a teacher in the Indiana public school system. The couple purchased a home in 1974 that Ms. Jones continued to occupy after the divorce. Mr. Jones gave Ms. Jones $600 a week for household and personal expenses. Ms. Jones also contributed her salary to the family income, but it was always substantially less than the approximately $31,000 Mr. Jones provided from the service station's gross receipts each year. The Joneses lived well. Ms. Jones acquired large quantities of clothing, expensive diamond jewelry and furs; Mr. Jones wore Cartier watches and Gucci loafers. One Christmas, they purchased $500 worth of clothing for Mr. Jones' children from a previous marriage. The couple's federal income tax returns for the years of their marriage do not indicate a level of income that would permit them to net over $30,000 from the service station business each year for personal and household expenses. The business did not in fact generate sufficient money to support such withdrawals. At the time of the property distribution hearing Mr. Jones owed $40,000 to the state of Indiana in unpaid sales tax and $12,000 to the federal government in overdue income tax. Mr. Jones also apparently gambled away much of the earnings of the service station in the commodities market. According to Ms. Jones, Mr. Jones siphoned off money from both

the service station business and numerous commodities and stock accounts in which he had an interest. It was her contention during the property distribution hearings that Mr. Jones had secreted substantial assets in this way, and that she was entitled to share in the booty. In the alternative, Ms. Jones argued that if there was no such money, then Mr. Jones had wasted marital assets since the time of the divorce, and therefore she was entitled to a greater share of what remained. Mr. Jones, on the other hand, asserted that he had no such secret funds, and furthermore, that Ms. Jones was guilty of selling off or concealing certain marital assets herself, thus depriving him of his fair share.

The Indiana state court judge, after considering the parties' testimony and the evidence offered to bolster their contentions of concealment, concluded that the "allegations of secreting assets are probably true as to both parties" and that "the assets secreted by each party were of equal value and is not a matter that the court will consider in its final decision." *In re Marriage of Jones*, No. C-269-82 (Jasper Circuit Court, Indiana, Jan. 25, 1984) (order distributing property). The judge went on to award Ms. Jones the family residence, a 1981 Mazda automobile, her personal jewelry, and one half of the household furniture and furnishings. She was also ordered to assume debts owed to her credit union and to several retail clothing and jewelry stores, as well as any other debts incurred by her but not specifically ordered paid by Mr. Jones.

Mr. Jones was awarded the service station business and all its accounts, all personal property related to the business including tools, equipment and inventory, a 1973 Lincoln automobile, one half of the household furniture and furnishings, and certain financial assets in the form of stocks and investment accounts. He was ordered to assume debts owed by the service station and by the couple to various creditors, in addition to other debts incurred by him that Ms. Jones was not specifically ordered to pay. In the end, the Joneses each received roughly half of the net marital assets.

The judge's finding that the couple had secreted assets from one another in an equal amount forms the eye around which the current storm of litigation swirls. Ms. Jones was completely dissatisfied with the property division made by the judge, contending that there was no evidence from which the judge could have concluded that she had secreted marital assets, while on the other hand there was substantial evidence that Mr. Jones had concealed the existence of significant marital assets. Mr. Jones has never conceded this point however.

Mr. Psimos pursued post-judgment remedies for Ms. Jones in the form of a Motion to Amend Findings of Fact and Conclusions of Law and a Motion to Correct Errors. After these motions were denied by the trial judge, Mr. Psimos wrote to Ms. Jones and discussed the possibility of appealing the property distribution decision. In that letter Mr. Psimos rendered this professional assessment:

> . . . I feel that I have done substantial work and feel that there is error in the record and the possibility of reversal is good. As you know, I cannot promise you what the Appelate (sic) Court would do if we filed the Appeal.

Mr. Psimos' letter described in some detail the steps necessary to initiate and perfect an appeal. He stated that under Indiana law a praecipe would have to be filed within 30 days of April 16, 1984 (the date the trial judge denied Ms. Jones' post-judgment motions), and that the transcript of the property distribution hearing would have to be filed within 90 days of the April 16 date. Mr. Psimos also informed Ms. Jones that the cost for obtaining a transcript would probably run between $750 and $1500, but was a necessary expense if she wished to appeal.[2]

[2] He also informed her of other costs of appeal, as well as setting the value of his services to her through the appeal at $7500, although the letter does not appear to actually be a request for payment.

Ms. Jones indicated that she wished to appeal the property distribution order and therefore provided Mr. Psimos with an advance toward the cost of copying the transcript.[3] Although Mr. Psimos filed a praecipe in the Indiana Court of Appeals within the 30-day limit, he thereafter failed to file certain required documents and Ms. Jones' appeal was summarily dismissed by the appellate court. Mr. Psimos tried unsuccessfully to have the appeal reinstated. He eventually returned some of the money advanced to him by Ms. Jones, and paid the balance due on the transcript out of his own funds.

B. District Court Legal Malpractice Proceedings

Ms. Jones filed suit against Mr. Psimos for attorney malpractice in federal district court on November 9, 1984. Ms. Jones' complaint alleged that Mr. Psimos' failure to properly perfect the state court appeal was a breach of the duty of care he owed her, as well as a breach of contract. Mr. Psimos filed a counterclaim for unpaid attorney's fees, costs and expenses arising out of his representation of Ms. Jones in the divorce litigation. On March 20, 1986 Mr. Psimos moved for summary judgment against Ms. Jones on the malpractice claim. The district court judge heard argument on all pending motions on October 14, 1987 and again on February 12, 1988. The court ordered the parties to submit proposed findings of fact and conclusions of law on February 17, 1988. Ms. Jones was also given until that date to file a motion for leave to file a first amended complaint, a motion for which she had requested additional time at the February 12 hearing. On February 17, Ms. Jones filed her Motion for Leave to File a First Amended Complaint, but failed to file any proposed findings of fact and conclusions of law. Mr. Psimos objected to the motion on February 26 and filed his pro-

[3] It is unclear exactly how much Ms. Jones advanced to Mr. Psimos—she stated in her brief that the amount was $1000, while Mr. Psimos' brief indicates that the amount was $1800.

posed findings of fact and conclusions of law. The district court judge denied Ms. Jones' motion to file an amended complaint on August 18 and granted Mr. Psimos' motion for summary judgment on the same day. Judgment was entered against Ms. Jones on her malpractice claim, but Mr. Psimos' counterclaim for attorney's fees, costs and expenses remained pending.

Ms. Jones filed a notice of appeal to this court on September 16, 1988. At the time, the August 18 orders were not final and appealable due to the pending counterclaim. Furthermore, the district judge had not certified the decisions as immediately appealable under Fed. R. Civ. P. 54(b). On October 6, the district court entered an order, making the requisite findings and certifying the decisions as final and appealable orders. Ms. Jones did not file a new notice of appeal. Mr. Psimos later filed a Motion to Dismiss the appeal in this court, with supporting memorandum, contending that we did not have jurisdiction of the matter. That motion was denied.

II. ANALYSIS

The parties raise three issues. Initially, Mr. Psimos continues to assert that this court does not have jurisdiction over this appeal. We do not address this issue again for we decided it against Mr. Psimos in our order dated January 30, 1989.[4] Ms. Jones raises two additional issues. First, Ms. Jones contends that the district court erred when it granted Mr. Psimos' Motion for Summary Judgment on her attorney malpractice claim. Second, she argues that the district court should have granted her mo-

[4] *See Jones v. Psimos*, No. 88-2913 (7th Cir. Jan. 30, 1989) (order denying Defendant-appellee's Motion to Dismiss). We denied Mr. Psimos' motion based on *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 760 F.2d 177 (7th Cir. 1985) ("*LCO*"). We recently confirmed the continuing viability of *LCO* in *Yockey v. Horn*, No. 88-1274, slip op. at 5, n.4 (7th Cir., July 26, 1989).

App. 6

tion to amend the complaint to include a constructive fraud claim.

A. Attorney Malpractice

A grant of summary judgment is reviewed *de novo* and we apply the same standard of decisionmaking on review as that employed by the district court. *McMillian v. Svetanoff*, No. 88-2335, slip op. at 3 (7th Cir., June 6, 1989); *Greer Properties, Inc. v. LaSalle Nat'l Bank*, 874 F.2d 457, 459 (7th Cir. 1989). Summary judgment will be affirmed where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "A party faced with a motion for summary judgment who bears the burden of proof on a particular issue may not rest on its pleadings but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact for trial." *McMillian*, slip op. at 3 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

Both parties agree that in order to establish a prima facie case of attorney malpractice under Indiana law, a plaintiff must demonstrate that she (1) employed the attorney, (2) who failed to exercise ordinary skill and knowledge, (3) proximately causing, (4) damage to the plaintiff. *See Bailey v. Martz*, 488 N.E.2d 716, 719 (Ind. App. 1986); *Fiddler v. Hobbs*, 475 N.E.2d 1172, 1173 (Ind. App. 1985). Ms. Jones and Mr. Psimos also agree that the determinative issue is the question of causation. Mr. Psimos was clearly hired by Ms. Jones to represent her, and Mr. Psimos, for purposes of argument, accepts that he failed to exercise ordinary skill and knowledge by an attorney when he neglected to file the papers necessary to perfect Ms. Jones' appeal. The question is whether this negligence caused any damage to Ms. Jones. She quite obviously has lost any rights to further appeal the property distribution entered in the Joneses' divorce case, but that alone is insufficient to impose liability upon Mr. Psimos. "[A] party must establish that there was a valid claim in the underlying action which was allegedly mishandled by the defendant attorney. In other words, the client must show

that the attorney's negligence proximately caused the injury." *National Wrecking Co. v. Spangler, Jennings, Spangler & Dougherty*, 782 F.2d 101, 104 (7th Cir. 1986) (applying Indiana law) (citation omitted). The defendant law firm in *National Wrecking*, like Mr. Psimos, failed to perfect an appeal for its client National Wrecking Company. National Wrecking sued for attorney malpractice. On appeal, this court affirmed the district court's grant of summary judgment in favor of the law firm when the plaintiff corporation failed to prove that it had a valid underlying claim that had been lost as a result of the defendant's neglect.

Similarly, Mr. Psimos claims that summary judgment was properly granted in his favor because Ms. Jones did not have a valid underlying claim. Ms. Jones, on the other hand, disagrees, asserting that if Mr. Psimos had perfected the appeal the Indiana Court of Appeals would have reversed the property distribution order of the trial court. This is in fact what Ms. Jones would have to prove in the district court if she were to succeed in her attorney malpractice claim. When analyzing the merits of an attorney malpractice claim, the court must put itself into the role of the court that ought to have reviewed the underlying claim but missed its chance because of the attorney's negligence in perfecting the appeal. *See* R.E. Mallen & V.B. Levit, *Legal Malpractice* § 583, at 738-40 (2d ed. 1981).[5] We are, as was the district court before us, left

[5] Section 583 provides:

> *CAUSATION.* The most common issue concerning an error in handling an appeal is whether the attorney's negligence caused damage. Initially, the client must prove that but for the attorney's negligence, the plaintiff would have prevailed. The resolution of this issue has on occasion puzzled trial judges, who wonder how they can possibly determine what an appellate court would have done upon review of the underlying action. This decision must be made by the trial judge as an issue of law, based upon review of the transcript and record of the underlying action, the argument of counsel, and subject to the same rules of review as should have been applied by the appellate courts.

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with the difficult task of determining what the Indiana appellate court might have done had it had the chance. If it would have reversed in favor of Ms. Jones, then we must reverse the grant of summary judgment by the district court in Mr. Psimos' favor and let Ms. Jones' malpractice claim go forward. If, on the other hand, the Indiana appellate court would not have reversed the property distribution order, then Ms. Jones has suffered no injury by Mr. Psimos' failure to perfect the appeal and the district court's award of summary judgment in his favor was proper. Our task, therefore, is to place ourselves in the shoes of an Indiana appellate court.

The Indiana Dissolution of Marriage Act, Ind. Code Ann. §§ 31-1-11.5-1 to -26 (West Supp. 1988), provides the statutory scheme under which the Indiana trial judge divided the Joneses' marital property. According to the Act, "the court shall divide the property of the parties . . . in a just and reasonable manner." Ind. Code Ann. § 31-1-11.5-11(b) (West Supp. 1988). Furthermore,

> [t]he court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence concerning the following factors, that an equal division would not be just and reasonable:
>
> (1) The contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker;
>
> (2) The extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift;
>
> (3) The economic circumstances of the spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell therein for such periods as the court may deem just to the spouse having custody of any children;

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> (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property; and
>
> (5) The earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

Ind. Code Ann. § 31-1-11.5-11(c)(1)-(5) (West Supp. 1988). The court is to divide both assets and liabilities under this scheme. *Hunter v. Hunter*, 498 N.E.2d 1278, 1293 (Ind. App. 1986).

The appellate courts of Indiana review property distribution decisions under an abuse of discretion standard. *Id.* at 1293; *In re Marriage of Rupp*, 449 N.E.2d 1164, 1166 (Ind. App. 1983). On review, the appellate court does not reweigh the evidence and considers only that evidence, and reasonable inferences therefrom, that is most favorable to the appellee. *In re Marriage of Rupp*, 449 N.E.2d at 1166. There is a presumption under Indiana law that the court properly applied these factors when dividing marital property, *Id.*; *Baker v. Baker*, 488 N.E.2d 361, 365 (Ind. App. 1986); *In re Marriage of Mulvihill*, 471 N.E.2d 10, 13 (Ind. App. 1984). The party challenging the trial court's division of property bears the burden of proof in overcoming this presumption. *Hunter*, 498 N.E.2d at 1293; *Temple v. Temple*, 435 N.E.2d 259, 260 (Ind. App. 1982). The trial court's decision will be reversed "only where the result reached is clearly against the logic and effect of the facts and circumstances before the court. The fact that the evidence might support a different conclusion by the trial court does not permit us to substitute our judgment." *Hunter*, 498 N.E.2d at 1293 (citing *Taylor v. Taylor*, 436 N.E.2d 56 (Ind. 1982), and others). We thus review the Indiana trial court's property distribution decisions under an abuse of discretion standand.

In the present case, Ms. Jones claims that the trial court abused its discretion when dividing the couple's marital assets and liabilities and in making the following specific

findings: that both parties had secreted assets; that the secreted assets were of equal value; that Mr. Jones failed to remit taxes to the State of Indiana; that Mr. Jones convinced his wife that the filling station was thriving; that the personal property at the service station was worth only $12,000; that certain stock was worth only $937; and that the value of the service station business was $110,000. A number of these issues can be dealt with quickly.

Although Ms. Jones challenges the Indiana trial court's finding that her former husband owed substantial taxes to the State of Indiana, she never offered any evidence to refute Mr. Jones' testimony. Mr. Jones testified that at the time of the marriage's dissolution he owed nearly $41,000 to the state of Indiana in unpaid sales tax. At a November 1982 provisional hearing, Mr. Jones indicated that he had a federal tax debt of $12,000 and a state tax debt of over $40,000. The trial judge concluded that Mr. Jones had been avoiding the payment of taxes for quite some time in order to maintain the couple's lifestyle. The record supports such a conclusion. The record of the property distribution hearings indicates that Mr. Jones was giving Ms. Jones $600 a week out of the gas station's gross receipts for personal and household expenses. He also, in the later years of the couple's marriage, moved large amounts of money around between the station's expense account and several commodities accounts. He eventually liquidated a ready asset account he had at Merrill Lynch (worth approximately $8,000) in order to pay off some of the taxes he owed. We find no error in the trial judge's determination that Mr. Jones had a significant tax debt.

We find Ms. Jones' challenge of the trial court's finding that Mr. Jones had convinced her that the service station was a thriving business irrelevant. Whether Mr. Jones convinced her of that, or whether she convinced herself of that, is beside the point. We do not doubt that Ms. Jones believed that the service station was more profitable than it actually was, but an ill-founded belief con-

cerning the profitability of the service station, whatever its source, is immaterial in a division of the couple's property. The business may have appeared to be thriving at one point, but the weekly withdrawals which gave the business an appearance of good health were actually a cancer that left the station over $80,000 in debt at the time of the Joneses' divorce.

Ms. Jones' objection to the trial court's finding that the service station business was worth $110,000 is also without merit. Mr. Jones suggested a worth far below the court's finding. Ms. Jones suggested a worth of between $100,000 and $150,000. The worth found falls within the range of Ms. Jones' estimate; she therefore has no grounds on which to complain. Furthermore, although Ms. Jones states in her brief that she challenges the trial court's $12,000 estimate on the worth of personal property associated with the station, she never elaborates or points to any reference in the record to indicate that that amount is unreasonable. We can find no evidence in the record to suggest a valuation other than the $12,000 figure. We therefore see no error in the court's finding.

Additionally, there is no fault in the trial court's determination that certain stock owned by the couple was worth only $937. There was evidence that by the time the property disposition hearings were held the stock was worth over $12,000, but under Indiana law the value of a marital asset or liability is to be measured at the time of dissolution—in this case, February 9, 1982. Mr. Jones submitted evidence that established that the stock was worth only $937 on that date. The stock's value at some later date was irrelevant.

We are left finally with the only two issues that merit discussion: the trial court's conclusion that both parties in the Joneses' divorce had secreted marital assets and the judge's determination that the secreted assets were of equal value. This second conclusion permitted the judge to ignore the parties' allegations of concealment and dissipation of assets and get down to the business of dividing up what they were in fact able to prove existed. Ms. Jones

makes extensive but rambling and not altogether accurate references to the hearing transcripts in her brief. For example, she claims that she testified at the distribution hearing that Mr. Jones brought money bags into the house three times a week in late 1981 and early 1982. She cites a bottom line figure of $480,000. Apparently Ms. Jones believes that Mr. Jones was squirreling this money away and has it hidden somewhere. In reality the transcript of the hearings confirms neither the amount suggested nor the level of activity alleged by Ms. Jones. The record implies only that Mr. Jones kept the service station's bank deposit bag in a safe in the Joneses' home. From such information one cannot conclude that Mr. Jones was stashing large amounts of cash anywhere.

Moreover, Ms. Jones has not bothered to confine herself to a discussion of the value of marital assets at the time of the dissolution. For example, she brings up facts such as how much Mr. Jones deposited over time into a commodities account he shared with another man without tying this information to the value of marital assets on February 9, 1982. She also discusses a liquor license, valued at $10,000, once owned by a corporation (JWJT Corporation, of which Mr. Jones was a principal) which was defunct by the time the couple divorced. Ms. Jones also mentions a secret property trust she claims has a value of $100,000, but makes no citation to the record to support her claim that this is an asset secreted by Mr. Jones. A close reading of the transcript failed to reveal any mention whatsoever of any such property trust. The laundry list goes on, containing the same sort of vague allegations, unsupported claims and unidentified items.

In contrast, Ms. Jones plays down any actions she took that might be construed as concealment of assets. Yet there is no question that she sold an organ, purchased by her husband some years before, for $3000 not long after he moved out of the family home. She also admitted to taking three checks from the service station expense account checkbook, two of which she later cashed without her husband's knowledge for a total of $3000.

In such circumstances, where the record was cluttered with irrelevant valuation information, providing very little real evidence from which the trial court could make an accurate evaluation of the couple's assets, secreted or otherwise, we do not believe that the Indiana appellate court could possibly have found the judge's determination on this issue to be an abuse of discretion. The trial judge had the opportunity to observe both parties and found them to be bitter and acrimonious toward each other, interested more in punishing one another than in aiding him in the equitable division of their property. The Indiana Court of Appeals does not second guess a trial judge's weighing of the evidence, *see Temple*, 435 N.E.2d at 262, nor should we.

In the end, the Indiana trial judge made a virtually equal division of those net marital assets that he could clearly identify and value from four days of testimony. As noted earlier, there is a presumption under Indiana law that an equal division of marital property is just and reasonable. Ind. Code Ann. § 31-1-11.5-11(b). Ms. Jones has failed to rebut that presumption as well as the presumption that the trial court failed to properly weigh the factors listed in Ind. Code Ann. § 31-1-11.5-11(b)(1)-(5). Because we do not believe that the Indiana appellate court would have reversed the trial judge's disposition of the Joneses' marital property as an abuse of discretion, we hold, as did the district court, that Ms. Jones failed to establish an element of the prima facie case for attorney malpractice in Indiana—causation—and that the district court therefore did not err in granting Mr. Psimos' Motion for Summary Judgment.

B. Constructive Fraud

Ms. Jones filed her original complaint against Mr. Psimos on November 9, 1984. In that complaint she alleged only one theory of legal malpractice—attorney negligence. More than three years later, Ms. Jones sought to amend her complaint to include a theory of constructive fraud. Mr. Psimos adamantly opposed Ms. Jones' motion, arguing

that (1) Ms. Jones had no valid cause of action for constructive fraud, (2) Ms. Jones' motion was untimely, and (3) Mr. Psimos would suffer substantial prejudice if the court granted the motion. The district court denied Ms. Jones' motion, agreeing with all three of Mr. Psimos' objections.

A district court's denial of a motion to amend pleadings under Fed. R. Civ. P. 15(a) will be overturned on appeal only upon a showing of abuse of discretion. *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618, 625 (7th Cir. 1987). Rule 15(a) provides, in pertinent part, that

> [a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

As the proposed amended complaint was not offered until well after all responsive pleadings had been filed (and in fact not until after discovery was closed and a pretrial order issued), Ms. Jones could file her amended complaint only with leave of the district court or the written consent of Mr. Psimos.

The district court carefully considered Ms. Jones' motion in light of Mr. Psimos' objections. Initially, the court found that Ms. Jones' amended complaint failed to state a cause of action for constructive fraud. The court noted that while Indiana recognizes a cause of action for constructive fraud, Ms. Jones failed to state a prima facie case in her amended complaint. Under Indiana law, constructive fraud "arises by operation of law from conduct which, if sanctioned by law, would secure an unconscionable advantage." *Whiteco Properties, Inc. v. Thielbar*, 467 N.E.2d 433, 437 (Ind. App. 1984) (citation omitted).

> [I]f one party is induced by another on the face of an oral promise, to place himself in a worse position than he would have been in had no promise been made, and if the party making the promise derives a benefit as a result of the promise, a constructive fraud exists which is subject to the trial court's equity jurisdiction.

Id. (quoting *Lawshe v. Glen Park Lumber Co.*, 176 Ind. App. 344, 347, 375 N.E.2d 275, 278 (1978) (citation omitted)). The district court found that Ms. Jones was unable to establish a prima facie case for constructive fraud because she was unable to prove that Mr. Psimos derived a benefit or gained an advantage as a result of his failure to properly perfect Ms. Jones' appeal. The district court therefore found this to be a sufficient basis upon which to deny Ms. Jones' motion.

Additionally, however, the district court also found that her motion was untimely, having been filed 39 months after her original complaint, well after the close of discovery and entry of a pretrial order. The district court cited *Kleinhans*, wherein we held that it was not an abuse of discretion for the district court to deny a motion to amend a complaint to add additional claims when the amendment was not based on any newly discovered information and was filed 18 months after the original complaint and 6 months after discovery had closed. *Kleinhans*, 810 F.2d at 625.

Furthermore, the district court reasoned that substantial prejudice to Mr. Psimos would result from permitting Ms. Jones to amend her complaint at such a late date. The court noted that Ms. Jones' attorney malpractice claim against Mr. Psimos had been pending since November 1984, that substantial time and effort had been spent preparing appropriate pleadings, motions and briefs defending the negligence claim, and that permitting Ms. Jones to raise an entirely new theory would serve only to unnecessarily prolong the litigation and severely prejudice Mr. Psimos because the new allegations could easily

have been made and addressed from the initial filing of the suit.

Ultimately, the district court denied Ms. Jones' motion, stating that any one of Mr. Psimos' three objections was sufficient grounds upon which to deny the motion. We agree; there was no abuse of discretion and the ruling is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MARCIA JONES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
HARRY PSIMOS,	)	
	)	
Defendant.	)	
**********	)	NO. H84-755
	)	
HARRY PSIMOS,	)	
	)	
Counter-Claimant,	)	
	)	
v.	)	
	)	
MARCIA JONES,	)	
	)	
Counter-Defendant.	)	

ORDER

Presently before this Court is the Defendant's (hereafter Psimos) Motion for Summary Judgment, arising out of Plaintiff's claim of legal malpractice. The origin of this case is the divorce proceedings between Marcia and Edward L. Jones. A dissolution of marriage was entered in Lake Superior Court under

Case No. 382-192. The issue of property distribution was reserved for a later time.

On November 23, 1982, Jasper Circuit Court Judge Daugherty entered an order dissolving the marriage. Thereafter, the parties conducted discovery with regard to the issue of property distribution. The Court held a hearing on the issue of property distribution and testimony was presented for four days in the Summer of 1983. On January 25, 1984, Judge Daugherty entered an order distributing the marital assets.

Subsequent to January 25, 1984 and pursuant to the request of Marcia, Psimos filed a motion to correct errors. This motion was denied on April 16, 1984. Thereafter, Psimos filed a Praecipe to initiate an appeal of Judge Daugherty's decision. A pre-appeal statement and other relevant pleadings

were not timely filed and the Court of Appeals dismissed the case. Subsequent efforts to reinstate the appeal were fruitless.

Several lawsuits were filed by Marcia as a result of the divorce proceedings, in addition to the one presently before the Court. However, it is the Court's opinion that these previous proceedings are not relevant to this Court's resolution of the issue before it.

In relevant part, the Complaint alleges that Psimos was employed to appeal Judge Daugherty's order of property distribution. In violation of is duty to timely proceed with this appeal, Psimos failed to file the requisite documents and the case was dismissed. Specifically, the Complaint alleges:

> "5. In violation of his duty to the plaintiff, the

> defendant, Harry Psimos, failed to file the required documents within the time permitted, and thereby forfeited the plaintiff's right to appeal. This failure was negligent, in breach of contract with his client, the plaintiff to protect her rights on appeal, and not in accordance with the standard for the practice of law in Indiana.
>
> 6. As a result of the defendant's misconduct, as aforesaid, the plaintiff has been damages by not having the opportunity of having the court of appeals review the judgment of the Jasper Circuit Court which awarded substantial property to her former husband. The plaintiff has been damaged in the approximate amount of $800,000."

Under Indiana law, in order for a plaintiff to succeed on a claim for attorney negligence or legal malpractice, the plaintiff must prove: (1) employment of the attorney (the duty); (2) failure of the attorney to exercise ordinary skill and knowledge (the breach), which (3) proximately causes; (4) loss to plaintiff (damages).

Bailey v. Martz, 488 N.E.2d 716, 719 (Ind. App. 1986); Fiddler v. Hobbs, 475 N.E.2d 1172, 1173 (Ind. App. 1985). Psimos directs this Court to an excerpt from R.E. Mallen and V.B. Levit, Legal Malpractice, 2d, the Appellate Attorney, §583, pp. 738-740 which states:

> "CAUSATION. The most common issue concerning an error in handling an appeal is whether the attorney's negligence caused damage. Initially, the client must prove that but for the attorney's negligence, the plaintiff would have prevailed on appeal. (Citations omitted).

The passage goes on to discuss that the reviewing judge must determine what an appellate court would have done upon review of the underlying action, if the attorney's negligence had not precluded this review. It is noted that this decision must be made by a trial judge "as an issue of law, based upon review of the transcript and record of the underlying action, the argument of

counsel, and subject to the same rules of review as should have been applied by the appellate court." (Citation omitted).

> ". . . Even if the appeal would have been successful, the plaintiff must next prove that he would have achieved a better result. (Citations omitted). This burden will be satisfied if the appeal itself would have resulted in a judgment in the client's favor without the need for a retrial. If a retrial is the end result of appellate review, however, then the client must next persuade the trier of fact that he would have done better upon a new trial. (Citation omitted). There must be a compensable injury since negligence of that damage is not actionable. (Citation omitted)."

In National Wrecking Company v. Spangler, Jennings, Spangler, and Dougherty, 782 F.2d 101 (7th Cir. 1986), the Seventh Circuit stated:

> "To state a claim for attorney malpractice under Indiana law, a party must establish that there was a valid claim in the underlying action which was allegedly mishandled by the defendant attorney. 3 Ind. Law

> Ency. Attorney and Client, §78. In other words, the client must show that the attorney's negligence proximately caused the injury. (Emphasis added)."

The first issue for this Court to address is whether the decision of Judge Daugherty concerning marital property distribution would have been reversed on appeal. The trial court has discretionary power concerning the division of marital property. Baker v. Baker, 488 N.E.2d 361 (Ind. App. 1986); Planert v. Planert, 478 N.E.2d 1251 (Ind. App. 1985). As the Indiana Appellate Court stated in Baker:

> "It is only the abuse of such discretion which is reviewable on appeal. The presumption in favor of the correct action of the trial court

final division of the property and final determination of the property rights of the parties.

Employing these considerations, the trial judge must weigh the evidence of the contributions by the parties and the assets presented in the record. The court in Baker stated that there is a strong presumption that the trial court considered the statutory factors found in 31-1-11.5-11(c) and properly applied them to its division of marital property assets. Baker v. Baker, 488 N.E.2d 361, 365 (Ind. App. 1986).

In the present case, there are voluminous transcripts and several affidavits in the record. A review of the entire record establishes that during the four days of testimony heard by Judge Daugherty, evidence on the following matters was presented to the court: (1) business statistics of the Jones' Shell station; (2) appraisal of the family home (two appraisals were submitted to the court, one by each

party); (3) appraisal of personal property within the home; (4) appraisal of an organ; (5) appraisal of the business property, i.e., equipment; (6) federal tax returns and tax related information; (7) a business operating statement; (8) W-2 Forms for Marcia; (9) checks written to Marcia on the Shell account; (10) numerous Merrill Lynch account statements concerning a commodity account, which included information concerning treasury bills, ready assets trust, security account; (11) checks purchased at the Gary National Bank, which related to trading in the Merrill Lynch account; (12) J.W.J.T. Inc. account statement; (13) statement from Bache-Heilsey Stewart Shield Inc. commodity account; (14) monthly budget and bills owing and paid in February of 1982; (15) Town and Country charge statements; (16) Marcia's

credit union account; (17) silverware and china owned by the Jones; (18) art work purchased; (19) several account statements from Marcus Jewelers; (20) account statement from Evans, women's clothing store; (21) statements concerning Marcia's earnings and deductions re Lincoln School employment; (22) Prudential insurance policy; (23) trips and vacations; (24) gifts to other women by Edward; (25) mortgage records; (26) monthly expenditures before separation; (27) bank records from the First National Bank of East Chicago; (28) account statements from Lane Bryant; and (29) Shell production account.

In Judge Daugherty's order, he begins by addressing the obvious attempt of the parties to "punis[h] the other party for the alleged wrongs they felt were committed against them in the

marriage, rather than arriving at a fair and equitable settlement of the marital property." Judge Daugherty found from the testimony that the allegations of secreting assets were probably true as to both parties, and that the assets secreted by each party were of equal value and was not a matter that the court would consider in its final decision.

Judge Daugherty went on to identify and discuss the fact that the Shell business had business debts in excess of $82,000, which most notably included unremitted taxes to the State of Indiana exceeding $40,000. Further, Judge Daugherty considered the family home, and used Marcia's appraisal as the value of that property, household furniture and furnishings in the residence, personal property, family automobiles,

American Surgeries Center common stock, Marcia's jewelry, and Edward's jewelry.

Judge Daugherty found that the Shell business should be considered a marital asset, in light of Marcia's contributions to the business during the marriage, and valued the business at $110,000. The court identified the parties' debts incurred during marriage to include: (1) mortgage on family home; (2) business debts of the Shell station; (3) personal debts incurred by Edward; (4) personal debts incurred by Marcia; and (5) Marcia's debt to her credit union.

In the final dissolution of the property, Judge Daugherty ordered that Marcia be awarded: (1) the family residence: (2) a 1981 Mazda automobile; (3) her jewelry; (4) one-half of the household furniture and furnishings, to be divided as provided for in his order.

He further found that Marcia would assume the following debts: (1) the mortgage on the family home and all other debts or liens relating to the real estate, such as taxes; (2) any and all debts owing to her credit union; (3) Marcus Jewelers; (4) Lane Bryant; (5) John M. Smith; (6) L.S. Ayres; and (7) any and all other debts incurred by her, but not specifically ordered paid by the husband.

Judge Daugherty found that Edward would be awarded: (1) the Shell service station business and all accounts related thereto; (2) all personal property related to the filling station business, to include tools, equipment, and inventory; (3) American Surgery Center stock; (4) Edward's jewelry; (5) 1973 Lincoln automobile; (6) one-half of the household furniture and furnishings, to be divided as hereinafter stated; (7)

all shares of stock in J.W.J.T. Inc.; (8) all interest in a Merrill Lynch ready account; (9) Watkin's account; (10) commodity account and gainer account numbers 540-5749 and 540-5736. The court further found and ordered that Edward would assume the following debts; (1) the Shell service station; (2) personal debts incurred by Edward, including Visa, Mastercharge, TWA, United Airlines, Sears, J.C. Penny, Evans, and American Express, and any other debts incurred by him and not specifically ordered paid by Marcia.

Lastly, the court found that neither party was without the money or means to employ counsel and that each would be responsible for paying their own attorney fees.

Keeping in mind that the standard by which this Court must review Judge Daugherty's decision is limited to the

issue whether he abused his discretion in distributing the marital assets, it appears that this issue must be answered in the negative. With the values available, a mathematical analysis of the distribution of assets and liabilities to Marcia and Edward appears to establish almost a 50-50 distribution. According to the Court's analysis, Marcia was assigned approximately $91,400 in assets and approximately $46,900 in liabilities. Thus, Marcia was awarded net assets of approximately $44,500.

As to Edward's share of the property distribution, the court concedes that the distribution is less clear, but certainly resolvable. It is correct that Judge Daugherty's decision does not reflect the value that the assigned to certain of Edward's assets, including: shares of stock in J.W.J.T. Inc., an

interest in a Merrill Lynch ready account, Watkin's account, commodity account, and gainer account numbers 540-5749 and 540-5736. However, despite her numerous unsupported allegations about the value of these assets, the Plaintiff has been unable to produce any evidence about their value.

The Court has sifted through the many pages of the transcript in this case, and has also been unable to find any evidence regarding the value of the above identified assets at the time of marital dissolution. The Court therefore assumes that the trial judge found that if after a four day hearing on the matter no evidence as to these assets' value was produced, these assets were of nominal value or did not exist at all in some cases.

A review of the record in this case establishes that Judge Daugherty

undertook the Jones' property distribution task with great diligence. Thus, this Court finds that the record establishes that the value of Edward's assets not expressly valued by Judge Daugherty in his opinion were at best of nominal value.

The value of the total assets assigned Edward is $132,800, excluding the value of the items discussed above. The value of the total liabilities assigned to Edward is $89,800. Thus, Edward was awarded net assets of approximately $43,000. To compare, Marcia was awarded approximately $44,500, and Edward $43,000.

Further, it is evident that Judge Daugherty considered the relevant factors identified by the Indiana Appellate Court for distributing marital assets. In Judge Daugherty's opinion (page 3, paragraph 9), he makes a

finding that the Shell station business, although acquired prior to marriage, should be deemed a marital asset in light of Marcia's contribution to its development and increase in value during the marriage. (See 31-1-11.5-11(c)(1)). Secondly, Judge Daugherty considered the economic circumstances of the parties (opinion, page 2, paragraphs 1, 4, 6, and 7), including a finding that both Marcia and Edward were employed and continued to be employed, and that there were no children born of the marriage. 31-1-11.5-11(c)(3).

Third, Judge Daugherty made a finding on page 1 of his opinion as to Marcia's and Edward's conduct regarding the disposition or dissipation of their property during marriage. In this finding, Judge Daugherty stated that he found both parties to be guilty of secreting assets, although he opined

that the assets secreted were of equal value, and therefore, would not be considered in the disposition of marital property. (See 31-1-11.5-11(c)(4)).

Additional, Judge Daugherty made findings as to the parties' earnings and earning capabilities. Judge Daugherty, in his opinion on page 2, paragraphs 6 and 7, and page 5, paragraph 16, found that both parties were employed and capable of paying their own attorneys' fees. See 31-1-11.5011(c)(5).

The only factor set forth in 31-1-11.5.11(c) that Judge Daugherty did not make a specific finding regarding is "the extent to which the property was acquired by each spouse prior to marriage or through inheritance or gift." It appears from the record that there was no property in question which fell within this category.

For the reasons previously set forth, it is the Court's opinion that if the Appellate Court had not dismissed Marcia's case, it would have affirmed the findings of the trial court. There is nothing in the record which could lead this Court to conclude that, in distributing Marcia's and Edward's marital assets, Judge Daugherty abused his discretion.

This Court has painstakingly reviewed the voluminous record in this case, and concludes that the gravamen of Marcia's Complaint is unsupported allegations about the existence and value of certain marital assets. Despite many opportunities and this Court' express directive that Marcia support these allegations with references to the transcript or other documentation, she has been unable to prove up her assertions.

In an affidavit, Marcia states that the actual division of property by Judge Daugherty was 70% to Edward and 30% to her, in light of the fact that Judge Daugherty refused to consider the assets allegedly secreted by the parties. (Marcia Jones affidavit, paragraph 4). Further, she attests that Judge Daugherty failed to consider numerous assets, and that said failure constitutes an abuse of discretion. She identifies these assets to include: cashiers checks totaling $185,823.45; 17 treasury bills valued at $10,000 each; a four-way liquor license number 450154; a $40,000 certificate of deposit at the Gainer Bank; a land trust of substantial value at 1101 Taft Street, Gary, Indiana; real estate located at 25th and Chase Streets in Gary, Indiana; a one-quarter interest in J.W.J.T. Corporation; and a one-half interest in

the $27,000 in the Merrill Lynch account of Willie Watkins. (Marcia Jones affidavit, paragraph 5).

Further, Marcia asserts that the Shell service station was undervalued. She states that almost $50,000 in assets derived from a Merrill Lynch ready trust, a Bache account, Merrill Lynch commodities account, and Jones' Shell commercial accounts were never accounted for in the divorce proceedings because subsequent to these assets being frozen by court order, they were made available to Edward and unaccounted for at the hearing. (Marcia Jones affidavit, paragraph 8).

This Court has been very lenient with Marcia, allowing her every opportunity to support her 70%/30% property distribution assertion. However, there is an end to patience. There is no evidence in the record to

support these assertions, nor, in the Court's opinion, is any such evidence expected to be forthcoming.

For the reasons set forth in this opinion, the Court finds that Judge Daugherty did not abuse his discretion when distributing Marcia's and Edward's marital property. Therefor, his decision would have been affirmed on appeal.

Of the four elements which must be sustained under Indiana law in order for a plaintiff to succeed on a claim for legal malpractice, causation is the primary and critical element of contention in this case. In the absence of Marcia being able to show that but for her attorney's negligence, the resolution of her case would have been more favorable to her, it is impossible for her to sustain a claim for legal malpractice under Indiana law.

Therefore, the Court GRANTS the Defendant's Motion for Summary Judgment. The United States Clerk of the District Court for the Central District of Illinois is directed to enter judgment in favor of the Defendant.

ENTERED: This 18th day of August, 1988.

_____

Michael M. Mihm
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MARCIA JONES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. H84-755
	)	
HARRY PSIMOS,	)	
	)	
Defendant.	)	

ORDER

Pending before the Court is the Plaintiff's Motion for Leave to File First Amended Complaint, filed on February 17, 1988. The Defendant filed a Memorandum in Opposition on February 26, 1988.

The Plaintiff's Motion to Amend states that the First Amended Complaint incorporates Count I of the original Complaint, in addition to, adding Count II which pleads a cause of action for constructive fraud. The Plaintiff asserts that both counts have been pursued in the discovery taken thus far,

and more particularly in the deposition of the Plaintiff. It is noted that a claim for constructive fraud was asserted by the Plaintiff in her supplemental brief filed in this case on November 16, 1987. During oral arguments held on the Defendant's Motion for Summary Judgment, the Court directed the Plaintiff to file a Motion for Leave to Amend on or before February 19, 1988 if she wished to pursue this theory of constructive fraud.

The Defendant adamantly opposes the Court granting leave to file a First Amended Complaint in the instant action. The Defendant sets forth three bases for this position: (1) the Plaintiff has no valid cause of action for constructive fraud; (2) the Plaintiff's Motion for Leave to File is untimely; and (3) the Defendant would suffer substantial prejudice if the Court grants the

Plaintiff leave to file the First Amended Complaint. The Court finds that all three of these reasons set forth by the Defendant are appropriate grounds upon which to deny the Plaintiff leave to file the First Amended Complaint.

A claim for constructive fraud in a legal malpractice case is provided for under Indiana law. Whiteco Properties, Inc. v. Theilbar, 467 N.E.2d 433, 437 (Ind. App. 1984). In Whiteco, the court sets forth a prima facie case for constructive fraud and states:

> "Constructive fraud is fraud that arises by operation of law from conduct which, if sanctioned by law, would secure an unconscionable advantage. Hoosier Ins. Co. v. Ogle, 150 Ind.App. 590, 276 N.E.2d 876 (1971). As stated in Lawshe v. Glen Park Lumber Co., 176 Ind.App. 344, 347, 375 N.E.2d 275, 278:
>
> > '[I]f one party is induced by other on the face of an oral promise, to place himself in a worse position than he would have been and had no promise been made, and if the party

> making the promise derives a benefit as a result of the promise, a constructive fraud exists which is subject to the trial court's equity jurisdiction. Hurd v. Ball, 128 Ind.App. 278, 143 N.E.2d 458 (1957).

In the instant case, the Court agrees with the Defendant's assertions that the Plaintiff cannot establish a prima facie case for constructive fraud. On the basis of the present record, the Plaintiff is unable to establish that she is in a "worse position" or that Harry Psimos derived a benefit as a result of a promise. The record appears clear that it was at all times the intention of Harry Psimos to file a Pre-Appeal Statement. There is no evidence in the record to suggest that Harry Psimos gained an advantage or derived a benefit as a result of failing to file a Pre-Appeal Statement. Therefore, the Court finds that the Plaintiff's Motion for Leave to File a First Amended

Complaint can and will be denied on the basis that Count II fails to state a claim for constructive fraud.

Secondly, the Defendant asserts that the Plaintiff's Motion for Leave to File is untimely. The original Complaint in this case wa filed on November 9, 1984. Nearly 39 months later, the Plaintiff, for the first time, attempts to amend her Complaint by adding a claim for constructive fraud. The record is devoid of any justification for the 39 months delay in amending the Complaint. There is no allegation of recently discovered facts that were not known at the time the Complaint was originally filed in November of 1984.

In Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618 (7th Cir. 1987), the Seventh Circuit held that it was not an abuse of discretion to deny a motion to amend a complaint to assert

additional claims where the amendment was not based on any information unknown when the complaint was filed 18 months earlier and was made six months after discovery had closed. In the instant case, discovery has been closed and in fact a pre-trial order has been filed.

For the reasons set forth in this discussion, the Court concurs with the Defendant's position that the Plaintiff's filing of this Motion for Leave to File an Amended Complaint is untimely. Therefore, the Plaintiff's Motion for Leave to File the First Amended Complaint can and will be dismissed on this ground.

Lastly, the Defendant asserts that as a result of the three and one-quarter years' delay in filing the constructive fraud claim, the Defendant would be substantially prejudiced if the Plaintiff were allowed to proceed at

this time with this new claim. The Defendant points out that he has been defending this action for legal malpractice since November of 1984. Substantial time and effort has been spent preparing appropriate pleadings, motions, and briefs in defending this cause of action. Now for the first time the Plaintiff attempts to add a new theory based upon totally new assertions which the Defendant asserts are unfounded. Therefore, to allow the case to go forward on the claim for constructive fraud would substantially prolong and severely prejudice the Defendant since these allegations could have been made and addressed three years earlier.

The Court must once again concur with the Defendant's position on this point. In the absence of any justification for why a completely new

claim has been brought three and one-quarter years after the original filing, this Court finds that to allow the Plaintiff to proceed at this late juncture would result in substantial prejudice to the Defendant. Therefore, the Defendant's substantial prejudice argument leads this Court to conclude that the Plaintiff's Motion for Leave to File a First Amended Complaint can and will be denied on this basis.

In conclusion, the Court finds that for any one of the three reasons set forth in this Order, the Plaintiff's Motion for Leave to File a First Amended Complaint is DENIED.

ENTERED: This 18th day of August, 1988.

Michael M. Mihm
United States District Judge

STATE OF INDIANA	)	IN THE JASPER
	)	CIRCUIT COURT
	)	SS:
COUNTY OF JASPER	)	SITTING AT RENSSELAER

In Re: The Marriage of	)	CAUSE NO.
EDWARD L. JONES,	)	C-269-8
Petitioner/Husband, and	)	
MARCIA A. JONES,	)	
Respondent/Wife	)	

ORDER

This matter came on for hearing on the final disposition of the assets of the parties, the Court having previously dissolved this marriage. This hearing involved four long, difficult days of testimony with a stack of exhibits, with each of the parties spending a considerable amount of time attempting to prove that the other party was secreting assets. It would further appear to the Court that the parties were more interested in punishing the other party for the alleged wrongs they felt were committed against them in the marriage, rather than arriving at a fair

and equitable settlement of the marital property. The Court finds from the testimony that said allegations of secreting assets are probably true as to both parties, but also finds that the assets secreted by each party were of equal value and is not a matter that the Court will consider in its final decision.

The Husband, during their marriage, had convinced the Wife that his filling station business was a thriving business and that he was a wealthy man. During the later years of the marriage, the Husband paid to the Wife Six Hundred Dollars ($600.00) a week cash to operate the household. Further, the parties spent money for household furniture, jewelry and clothing as if they were wealthy. The Husband was able to support the Wife in this style by not paying his business debts as indicated

by Petitioner's Exhibit No. 1, which shows business debts in excess of Eighty-two Thousand Dollars ($82,000.00), most notably by failing to remit taxes to the State of Indiana, which debt no exceeds Forty Thousand Dollars ($40,000.00). The Court is disregarding the attempts of both parties to financially punish the other party, and the Court now finds the facts to be as follows:

1. That the Husband and Wife were married on the 17th day of March of 1973, and there were no children born of this marriage.

2. That a verified Petition for Dissolution of Marriage was filed on the 9th day of February of 1982.

3. That the marriage of said parties was dissolved by this Court by order dated November 23, 1982.

4. That the Husband was the owner and operator of a filling station business, which he had owned and operated prior tot he marriage of the parties, having started said business in 1970.

5. That the real estate where said business is located is not owned by the Husband and is leased.

6. That the Husband, Edward L. Jones, is self-employed and at the time this marriage was dissolved, was still operating said business, the same being Jones Shell Service Station located in Gary, Lake County, Indiana.

7. That the Wife, Marcia A. Jones, is employed as a school teacher with the East Chicago, Indiana Public School System, and that she currently earns approximately Twenty-two Thousand Dollars ($22,000.00) per year.

8. That during the marriage, the parties accumulated certain real estate and personal property, the major items and the value therefor being as follows:

A. Real estate located at 3632 West 17th Avenue, Gary, Lake County, Indiana $69,000.00

B. Household furniture and furnishings located in said residence 7,800.00

C. Personal property located at Jones Shell Service Station 12,000.00

D. 1973 Lincoln Continental automobile 1,000.00

E. 1981 Mazda automobile 9,000.00

F. American Surgery Center common stock 937.00

G. Wife's jewelry 10,000.00

H. Husband's jewelry 5,000.00

9. The Court further finds that although the Husband owned the filling station business prior to the marriage, that the business was developed and

increased in value during the marriage of the parties, due to the efforts of both parties and that the same should be considered as a marital asset. The Court now finds that the value of the said business is One Hundred Ten Thousand Dollars ($110,000.00).

10. The Court further finds that the parties have incurred certain debts during the marriage, which debts are as follows:

A.	Mortgage owing on real estate	$30,713.48
B.	Debt owing on filling station business	82,225.47
C.	Personal debts incurred by the Husband	7,800.00
D.	Debt owing to the Wife's credit union	10,000.00
E.	Personal debts incurred by the Wife	6,900.00

11. The Court further finds that as a full, final and complete settlement of

the assets of the parties, that the Wife should be awarded the following:

A. Residence of the parties

B. 1981 Mazda automobile

C. Wife's jewelry

D. One-half of the household furniture and furnishings, to be divided as hereinafter stated.

12. The Court further finds that the Wife should assume and pay and hold the Husband harmless from the payment of the following debts:

A. Mortgage owing on said real estate and any other debts or liens related to said real estate, such as taxes.

B. Any and all debts owing to her credit union

C. Marcus Jewelers

D. Lane Bryant

E. John M. Smyth

F. L. S. Ayres

G. Any and all other debts incurred by the Wife, but

not specifically ordered paid by the Husband.

13. The Court further finds that the Husband should be awarded as his own separate property free and clear of any claim by the Wife, the following items:

A. The business commonly known as Jones Shell Service Station, and any and all accounts related thereto

B. All personal property related to the filling station business, to include tools, equipment and inventory

C. American Surgery Center stock

D. Husband's jewelry

E. 1973 Lincoln automobile

F. One-half of the household furniture and furnishings, to be divided as hereinafter stated

G. All shares of stock in J.W.J.T. Inc.

H. All interest in a Merrill Lynch Ready Account; Watkins Account; Commodity Account; and Gainer

Account Numbers 540-5749 and 540-5736.

14. The Court further finds that the Husband shall assume and pay and hold the Wife harmless from the payment of the debts for the following:

A. Jones Shell Service Station

B. Personal debts incurred by the Husband, including VISA, Master Charge, TWA, United Airlines, Sears & Roebuck Co., J.C. Penney, Evans, and American Express, and any and all other debts incurred by the Husband separately and not specifically ordered paid by the Wife.

15. As to the household furniture and furnishings, said items are to be divided equally between the parties. That the Wife shall select first from those items listed on Petitioner's Exhibit No. 4 and thereafter, the Husband shall select from said list, with each party selecting alternately

until all of said items have been selected. In the event that the value of the property selected by one party exceeds the value of the property selected by the other party by more than One Hundred Dollars ($100.00), that an adjustment shall be made between the parties. In the event the parties cannot agree as to a division of the personal property, the Court will then divide said property for the parties.

16. The Court further finds that neither of the parties are without the money or means to employ counsel and that therefore each party should be responsible for paying their own attorney fees.

17. The Court further finds that each of the parties should execute any and all documents necessary to carry out the terms of this Order.

IT IS THEREFORE, ORDERED AND DECREED by the Court that the Wife shall have as her own separate property, free and clear of any claim by the Husband, the following listed items:

A. Residence of the parties

B. 1981 Mazda automobile

C. Wife's jewelry

D. One-half of the household furniture and furnishings to be divided as hereinafter stated.

It is further ordered that the Wife shall assume and pay and hold the Husband harmless from the payment of the following debts:

A. Mortgage owing on said real estate and any other debts or liens related to said real estate, such as taxes

B. Any and all debts owing to the Wife's credit union

C. Marcus Jewelers

D. Lane Bryant

E. John M. Smyth

F. L.S. Ayers

G. Any and all other debts incurred by the Wife, but not specifically ordered paid by the Husband.

It is further ordered that the Husband shall have as his own separate property, free and clear of any claim of the Wife, the following listed items:

A. The business commonly known as Jones Shell Service Station and any and all accounts related thereto

B. All personal property related to the filling station business, to include tools, equipment and inventory

C. American Surgery Center stock

D. Husband's jewelry

E. 1973 Lincoln automobile

F. One-half of the household furniture and furnishings, to be divided as hereinafter stated

G. All shares of stock in J.W.J.T. Inc.

H. All interest in a Merrill Lynch Ready Account; Watkins Account; Commodity Account and Gainer Account Numbers 540-5749 and 540-3736.

It is further ordered that the Husband shall assume and pay and hold the Wife harmless from the payment of the following debts:

A. Any and all debts incurred on behalf of Jones Shell Service Station

B. Personal debts incurred by the Husband, including VISA, MAster Charge, TWA, United Airlines, Sears & Roebuck Co., J.C. Penney, Evans, and American Express, and any and all other debts incurred by the Husband an not specifically ordered paid by the Wife.

It is further ordered that the household furniture and furnishings are to be divided equally between the parties. That the Wife shall select first from those items listed on Petitioner's Exhibit No. 4 and

thereafter the Husband shall select from said list, with each party selecting alternately until all of said items have been selected. In the event that the value of the property selected by one party exceeds the value of the property selected by the other party by more than One Hundred Dollars ($100.00), that an adjustment shall be made between the parties. In the further event that the parties cannot agree as to a division of said personal property, the Court will then divide said property for the parties.

It is further ordered that each of the parties shall assume and pay their own attorneys fees in this matter.

It is further ordered that each of the parties shall execute any and all documents necessary to carry out the terms of this Order. Further ordered that in the event the Petitioner should

fail to execute and deliver a Quit-Claim Deed for the residence of the parties to the Respondent, that the Court appoints Wayne Simmons as Commissioner to execute said Deed.

Done and ordered this 25th day of January, 1984.

_____

E. Duane Daugherty, Judge
Jasper Circuit Court
30th Judicial Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 26, 1989

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

No. 8802913	)	Appeal from the United
	)	States District Court
MARCIA JONES,	)	for the Northern
Plaintiff-	)	District of Indiana,
Appellant,	)	Hammand Division.
	)	
vs.	)	
	)	Civil No. H 84-755
HARRY PSIMOS,	)	Michael H. Mihm,
Defendant-	)	
Appellee.	)	Judge

ORDER

On consideration of the petition for rehearing filed on September 5, 1989 in the above-entitled cause by plaintiff-appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
MAY 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1385

In The

Supreme Court of the United States

October Term, 1989

MARCIA JONES,

Petitioner,

v.

HARRY PSIMOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the mandatory and jurisdictional prerequisites for appellate jurisdiction have been met when petitioner failed to timely file a notice of appeal after the entry of the final appealable judgment.

2. Whether the petitioner timely filed with this Court corrected copies of the petition within 150 days after the entry of the order denying the petition for rehearing in the circuit court.

3. Whether the petitioner has cited to sufficient evidence in the record to set forth a *prima facie* case of legal malpractice at the appellate level under Indiana law.

4. Whether a substantial federal question has been raised.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Seventh Circuit are listed in the caption.

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No. 89-1385

In The

Supreme Court of the United States

October Term, 1989

MARCIA JONES,

Petitioner,

v.

HARRY PSIMOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Harry Psimos, respectfully prays that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

1. The order of the Indiana state court, Jasper Circuit Court, Rensselaer, Indiana, distributing the property in a dissolution of marriage case entered on January 25,

1984 is unreported. It is reprinted in petitioner's Appendix (App. 50-64).

2. The order of the United States District Court for the Northern District of Indiana granting summary judgment in favor of the respondent entered on August 18, 1988 is unreported. It is purportedly reprinted in petitioner's Appendix (App. 18-41). However, page five (5) of the district court's fourteen (14) page order is omitted from petitioner's Appendix. The order is therefore reproduced in its entirety in respondent's Appendix (App. 1-13).

3. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the district court's order granting summary judgment in favor of the respondent entered on August 21, 1989 as amended on August 28, 1989 is reported at 882 F.2d 1277 (7th Cir. 1989).

4. The order of the United States Court of Appeals for the Seventh Circuit denying the petition for rehearing entered on September 26, 1989 is unreported. It is reprinted in petitioner's Appendix (App. 65).

JURISDICTION

Jurisdiction in the district court is based on diversity of citizenship. 28 U.S.C. § 1332. The underlying events occurred in Indiana and parties have previously agreed that Indiana law applies to the substantive issues. On November 9, 1984, Marcia Jones filed a complaint in district court against her former attorney, Harry Psimos, for legal malpractice at the appellate level in failing to timely file certain documents with the Court of Appeals

of Indiana. Subsequently, Psimos, *pro se*, filed a counter-claim against Jones for unpaid attorney's fees, costs and expenses incurred for his services rendered in the underlying state court divorce proceeding.

On August 18, 1988, District Court Judge Michael M. Mihm of the Central District of Illinois, sitting by designation, entered an order granting Psimos' motion for summary judgment on the legal malpractice claim only. The counter-claim remained viable. Jones filed a notice of appeal on September 16, 1988. At the time, the August 18, 1988 order was not a final and appealable order or judgment due to the pending counter-claim. Furthermore, the district court had not certified the decision as a final appealable decision pursuant to Fed.R.Civ.P. 54(b). Thus, the filing of a notice of appeal on September 16, 1988 was clearly premature since the order appealed from was not yet a final appealable order or judgment. On October 4, 1988, the district court then entered an order making the appropriate findings and certifying its prior order as a final appealable decision pursuant to Fed.R.Civ.P. 54(b). Judgment in a Civil Case was entered by the Clerk for the Northern District of Indiana on October 6, 1988. No notice of appeal was ever filed by Jones from the district court's final decision entered on October 6, 1988. *Jones v. Psimos*, 822 F.2d 1277, 1280 (7th Cir. 1989).

Jurisdiction in the court of appeals is purportedly based upon 28 U.S.C. § 1291 which confers jurisdiction of appeals from all final decisions of the district court. Psimos filed a motion to dismiss the appeal with supporting memorandum which was denied by the court of appeals on January 30, 1989. This issue was again raised by Psimos in his brief before the court of appeals, but the

merits of the motion were not addressed in the opinion. *Jones*, 882 F.2d at 1280, n. 4.

The court of appeals affirmed the district court's order granting summary judgment in favor of the respondent on August 21, 1989 as amended on August 28, 1989. On September 5, 1989, the petitioner filed a petition for rehearing which was denied by the court of appeals on September 26, 1989.

A petition for writ of certiorari was filed on December 26, 1989 asserting jurisdiction under 28 U.S.C. § 2101(c). On January 11, 1990, the clerk returned the petition to the petitioner for failure to comply with several of the Court's rules of procedure. Corrected copies were to be returned promptly in order for the case to be docketed. Sup.Ct.R. 33.7. On March 1, 1990, petitioner filed a corrected petition for writ of certiorari. Respondent asserts that a corrected petition is untimely since it was filed more than one hundred fifty (150) days after entry of the order denying the petition for rehearing. 28 U.S.C. § 2101(c); Sup.Ct.R. 13.1, 13.2 and 13.3.

STATUTE INVOLVED

The applicable Indiana statute, Ind. Code § 31-1-11.5-11 is set forth in its entirety in respondent's Appendix (App. 14-17). The relevant portion of that statute on disposition of property in a dissolution proceeding is set forth as follows:

> (c) The court shall presume that an equal division of marital property between the parties is just and reasonable. However, this presumption

may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

(1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.

(2) The extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift.

(3) The ecomonic circumstances of each spouse at the time of the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in that residence for such periods as the court may deem just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to a final division of the property and final determination of the property rights of the parties.

Ind. Code § 31-1-11.5-11(c) (1988).

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONER HAS FAILED TO COMPLY WITH THE MANDATORY AND JURISDICTIONAL PREREQUISITES FOR APPELLATE JURISDICTION BY FAILING TO TIMELY FILE A NOTICE OF APPEAL AFTER THE ENTRY OF THE FINAL APPEALABLE JUDGMENT OF OCTOBER 6, 1988.

This lawsuit arises out of an Indiana state court dissolution proceeding between Marcia and Edward Jones.

On February 9, 1982, Edward filed a Verified Petition for Dissolution of Marriage. Marcia Jones retained attorney Harry Psimos to defend her in the dissolution proceeding. On November 23, 1982, Jasper Circuit Court Judge Daugherty entered an order dissolving the marriage and, by agreement of the parties, retained the issue of property distribution for later determination.

During the summer of 1983, the trial judge heard four (4) days of testimony regarding the alleged assets and liabilities of Marcia and Edward. After taking the matter under advisement, the trial judge entered an order dated January 25, 1984 distributing the marital assets and liabilities. Marcia thereafter requested Psimos to appeal the trial judge's order. Unfortunately, Psimos failed to timely file required pre-appeal documents and the appeal was dismissed.

Marcia filed this action before the district court alleging legal malpractice at the appellate level against Psimos in the handling of the appeal. Psimos, *pro se*, filed a counter-claim for unpaid attorney's fees, costs and expenses. After the matter had been fully briefed, the district court judge, sitting by designation, entered an order on August 18, 1988 granting Psimos' motion for summary judgment on the legal malpractice claim.

The sequence of events during the next several weeks is significant and summarized as follows:

Date	District Court Activity
08/18/88	District court enters order granting Psimos' motion for summary judgment.

08/19/88 Judgment in a Civil Case entered by Clerk of the Central District of Illinois.

09/01/88 District court issues corrective order directing Clerk of the Northern District of Indiana to enter judgment.

09/09/88 Judgment entered of record by Clerk of the Northern District of Indiana.

09/16/88 Notice of appeal filed by Jones.

10/04/88 District court enters order directing judgment on legal malpractice claim pursuant to Fed.R.Civ.P. 54(b).

10/06/88 Judgment entered of record by Clerk of the Northern District of Indiana.

Generally, the timely filing of a notice of appeal of a final judgment divests the district court of jurisdiction over those aspects involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225, 227 (1982). The general rule does not operate when there is a purported appeal from a non-appealable order or a judgment. *Patzer v. Board of Regents of University of Wisconsin System*, 763 F.2d 851, 859 (7th Cir. 1985); *United States v. Bastanipour*, 697 F.2d 170, 173 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091, 103 S.Ct. 790, 76 L.Ed.2d 358 (1983).

United States District Court Judge Mihm, a visiting judge from the Central District of Illinois, entered summary judgment on the legal malpractice claim on August 18, 1988. The counter-claim remained pending in district court. The Clerk of the Central District of Illinois entered Judgment in a Civil Case as directed by the district court.

On September 1, 1988, the district court entered a corrective order directing the Clerk of the Northern District of Indiana to enter judgment which was completed on September 9, 1988.

On September 16, 1988, Jones filed a notice of appeal even though there was no final appealable decision due to a pending counter-claim. The district court's order granting summary judgment was not certified as a final appealable order under Fed.R.Civ.P. 54(b). At the time of the filing of the notice of appeal on September 16, 1988, there clearly was no final appealable decision in order to invoke federal appellate jurisdiction pursuant to 28 U.S.C. § 1291.

On October 4, 1988, the district court conducted a hearing on the pending motion for summary judgment on the counter-claim. The district court also discussed whether it had jurisdiction over the original claim since a premature notice of appeal had been filed. At the hearing, the parties and the district court agreed that the decision previously rendered on August 18, 1988 was not appealable since the counter-claim was pending. Moreover, summary judgment on the original claim had not been properly certified as a final appealable order or judgment under Fed.R.Civ.P. 54(b). The district court then entered an order on October 4, 1988 making the necessary findings under Fed.R.Civ.P. 54(b). Judgment in a Civil Case was entered by the Clerk of the Northern District of Indiana on October 6, 1988. Significantly, no notice of appeal was filed by Jones from the only final judgment entered on October 6, 1988.

A. THE UNTIMELY FILING OF THE NOTICE OF APPEAL ON SEPTEMBER 16, 1988 IS INSUFFICIENT TO INVOKE APPELLATE JURISDICTION.

Fed.R.App.P. 3(a) provides, in part:

> An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is a ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . .

The specific time frame in which to file a notice of appeal is set forth in Fed.R.App.P. 4(a)(1) which provides, in part:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . .

Further support for dismissal of the appeal is found in the Notes of Advisory Committee on Appellate Rules, 1979 Amendment, Fed.R.App.P. 4(a)(1), which provides, in part:

> The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "o[f]." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of

> appeal, it was thought useful to emphasize the fact that except as provided, *the period during which a notice of appeal may be filed is the 30 days* or 60 days as the case may be, *following the entry of the judgment or order appealed from*. (emphasis added).

The notice of appeal filed by Jones sought to appeal the district court orders of August 18 and September 1, 1988 as well as the entry of Judgments in a Civil Case dated August 19 and September 9, 1988. Due to the pending counter-claim, these orders and judgments were not final nor were they appealable under 28 U.S.C. § 1291. Unquestionably, the notice of appeal filed by Jones on September 16, 1988 was premature and untimely. The sole final Judgment in a Civil Case was entered by the clerk on October 6, 1988. Jones failed to file a notice of appeal from this final judgment in order for the appellate court to invoke jurisdiction over this case.

The time period within which to file a notice of appeal *cannot* be enlarged due to its jurisdictional nature. Fed.R.App.P. 2 provides, in part:

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules. . . .

Fed.R.App.P. 26(b) provides, in part:

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the *court may not enlarge the time for filing a notice of appeal* . . . (emphasis added).

Furthermore, the United States Supreme Court has required strict and technical compliance with Fed.R.App.P. 3 and 4. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988). In *Torres*, this Court strictly construed Fed.R.App.P. 3 and 4 and dismissed an appeal on jurisdictional grounds, stating:

> We find support for our view in the Advisory Committee Note following Rule 3:
>
> "Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is 'mandatory and jurisdictional,' *United States v. Robinson*, [361 U.S. 220, 224, 80 S.Ct. 282, 285, 4 L.Ed.2d 259 (1960)], compliance with the provisions of those rules is of the utmost importance." 28 U.S.C. App., p. 467.
>
> This admonition by the Advisory Committee makes no distinction between the various requirements of Rule 3 and Rule 4; rather it treats the requirements of these two rules as a single jurisdictional threshold. The Advisory Committee's caveat that courts should "dispense with literal compliance in cases in which it cannot fairly be exacted," *ibid.*, is not to the contrary. The examples cited by the Committee make clear that it was referring generally to the kinds of cases later addressed by the 1979 amendment to Rule 3(c), which excuses "informality of form or title" in a notice of appeal. [Footnote omitted]. Permitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogether as a jurisdictional threshold.

Torres, 108 S.Ct. at 2408.

This Court further prohibited courts of appeal from *enlarging* the time period within which to file a notice of appeal due to its expressly limited jurisdiction, stating:

> Rule 2 gives courts of appeals the power, for "good cause shown," to "suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion." Rule 26(b), however, contains certain exceptions to this grant of broad equitable discretion. *The exception pertinent to this case forbids a court from "enlarg[ing]" the time limits for filing a notice of appeal, which are prescribed in Rule* 4. (emphasis added).

Torres, 108 S.Ct. at 2407-08.

The choice of the word "enlarge" in Fed.R.App.P. 26(b) is extremely important and telling. "Enlarge" is broader than the word "extend." If Fed.R.App.P. 26(b) merely prohibited courts of appeals from "extending" the time for filing a notice of appeal, a premature notice of appeal may be treated differently. Fed.R.App.P. 26(b), however, prohibits courts of appeals from "enlarging" the time period prescribed for filing the notice of appeal. Therefore, the filing of a *premature* as well as the *late* notice of appeal is forbidden and strictly prohibited. Fed.R.App.P. 2, 3(a), 4(a)(1), 26(b); *Torres, supra*.

Fed.R.App.P. 4(a)(1) requires that a notice of appeal shall be filed with the clerk of the district court *"within* thirty days *after* the date of the entry of the judgment or order appealed from." (emphasis added). The only final appealable judgment as certified by the district court pursuant to Fed.R.Civ.P. 54(b) was the judgment entered on October 6, 1988. Fed.R.Civ.P. 54(b); Fed.R.App.P. 4(a)(1) and (6). Jones clearly failed to file a timely notice

of appeal *within* thirty (30) days *after* the date of judgment entered on October 6, 1988 as required by law. Fed.R.App.P. 3(a), 4(a)(1) and (6); *Torres, supra*. The appellate court did not have jurisdiction pursuant to 28 U.S.C. § 1291 over a clearly premature notice of appeal filed on September 16, 1988 from a non-final order or judgment. 28 U.S.C. § 1291; Fed.R.App.P. 2, 3(a), 3(c), 4(a)(1) and (6), 26(b); Fed.R.Civ.P. 54(b); *Torres, supra*.

B. THE NOTICE OF APPEAL FILED BY JONES FAILED TO DESIGNATE THE JUDGMENT, ORDER OR PART THEREOF APPEALED FROM AS REQUIRED UNDER FED.R.APP.P. 3(c).

The notice of appeal shall specify the party taking the appeal, shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Fed.R.App.P. 3(c). The notice of appeal filed by Jones on September 16, 1988 purports to appeal the:

> [J]udgment entered in this action on the 19th day of August, 1988 and on the 9th day of September, and the orders granting summary judgment and denying leave to file amended complaint entered in this action on the 18th day of August, 1988 and order entered in this action on the 1st day of September, 1988.

Undoubtedly, the orders and judgments cited in the notice of appeal are not final and appealable orders and judgments entered as required under Fed.R.App.P. 4(a)(6). The notice of appeal filed on September 16, 1988, fails to designate the only true judgment entered on October 6, 1988. Fed.R.App.P. 3(c) and 4(a)(6). Failure to strictly comply with the mandates of Fed.R.App.P. 3(c)

will result in dismissal of the appeal. *Torres, supra; Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (7th Cir. 1988) *on rehearing*. In *Torres*, 108 S.Ct. at 2409, this Court stated:

> We recognize that construing Rule 3(c) as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is "imposed by the legislature and not by the judicial process." [citation omitted].

C. A PRIOR SEVENTH CIRCUIT CASE RELYING ON THE "PRACTICAL APPROACH" TO APPELLATE JURISDICTION IS MISPLACED IN LIGHT OF A RECENT SUPREME COURT CASE.

A motion to dismiss this appeal for lack of appellate jurisdiction was denied by the appellate court citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 760 F.2d 177 (7th Cir. 1985) ("LCO"). *Jones*, 882 F.2d at 1280, n.4. In *LCO*, 760 F.2d at 181, n. 3., the appellate court stated:

> In *Marrese [v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985)], the district court certified an interlocutory order for immediate appellate review after the defendant had filed a notice of appeal on another issue. Here the district court certified its partial judgment for Rule 54(b) review after the State had filed a notice of appeal from the same judgment. Despite this factual difference between *Marrese* and this case, however, we believe that the *Marrese* decision demonstrates the Supreme Court's *practical approach to appealability rules*. (emphasis added).

To the contrary, the Supreme Court requires strict and technical compliance with Fed.R.App.P. 3 and 4 as a jurisdictional threshold. *Torres, supra.* Moreover, the Seventh Circuit in *Allen Archery, supra,* did not follow the "practical approach to appealability rules" as suggested by *LCO,* 760 F.2d at 181, n. 3 but rather, correctly noted that "*Torres* changed the law in this circuit." *Allen Archery,* 857 F.2d at 1177.

Jones also suggests in the circuit court that no prejudice has been shown by Psimos in allowing this appeal to go forward. This matter has been pending for nearly six (6) years. Substantial time, costs and expenses have been incurred in defending this meritless case. The court of appeals does not require prejudice as a ground to assert lack of appellate jurisdiction. A litigant's failure to clear a jurisdictional hurdle can never be "harmless" or waived by a court. *Torres,* 108 S.Ct. at 2409, n. 3.

Every court has an independent duty to determine whether it has jurisdiction over an appeal. *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.,* 860 F.2d 1441, 1443 (7th Cir. 1988). Upon review of the undisputed facts, this Court does not have jurisdiction over a premature notice of appeal filed on September 16, 1988 from a non-final order or judgment and this petition should be denied. 28 U.S.C. §§ 2101(c) and 1291; Fed.R.App.P. 2, 3(a) 3(c), 4(a)(1) and (6), 26(b); Fed.R.Civ.P. 54(b); *Torres, supra; Allen Archery, supra.*

II. PETITIONER HAS FAILED TO TIMELY FILE CORRECTED COPIES OF THE PETITION WITH THIS COURT WITHIN 150 DAYS AFTER ENTRY OF THE ORDER DENYING THE PETITION FOR REHEARING.

In a civil case, a party has ninety (90) days from the date of the judgment or, if a petition for rehearing was filed, from the date of the denial of the rehearing, within which to file petition for writ of certiorari in the United States Supreme Court. 28 U.S.C. § 2101(c) and Sup.Ct.R. 13.1. The court of appeals has no authority to enlarge these times, but this Court may extend the time up to sixty (60) additional days in civil cases. 28 U.S.C. § 2101(c); Sup.Ct.R. 13.2.

The court of appeals denied Jones' petition for rehearing on September 26, 1989. A petition for writ of certiorari was purportedly filed on December 26, 1989. On January 11, 1990, the Clerk of the Supreme Court returned the petition for failure to comply with several of the Court's rules of procedure. The original filing of the petition, however, shall not thereby be deemed untimely provided that new and proper copies are "promptly substituted." Sup.Ct.R. 33.7.

According to the clerk's office, corrected copies of the petition were not filed until March 1, 1990, sixty-five (65) days from the date of the original filing. Respondent asserts that the corrected copies were not "promptly substituted" as mandated by Sup.Ct.R. 13.7. In any event, the corrected copies were not filed until one hundred fifty-five (155) days from the date of denial of rehearing which is in excess of the maximum one hundred fifty (150) days allowed to pursue an appeal. 28 U.S.C. §2101(c);

Sup.Ct.R. 13.1 and 13.2. If the Court finds that the provisions of Sup.Ct.R. 13.7 have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs or disciplinary sanctions upon counsel. Sup.Ct.R. 13.7. The untimely petition should therefore be dismissed. 28 U.S.C. §2101(c); Sup.Ct.R. 13.1, 13.2 and 13.7.

III. PETITIONER HAS FAILED TO CITE TO SUFFICIENT EVIDENCE IN THE RECORD TO SET FORTH A *PRIMA FACIE* CASE OF LEGAL MALPRACTICE AT THE APPELLATE LEVEL UNDER INDIANA LAW.

In Indiana, the essential elements for a cause of action for attorney negligence or legal malpractice are as follows:

1. Employment of the attorney (the duty);
2. Failure of the attorney to exercise ordinary skill and knowledge (the breach); which
3. Proximately causes;
4. Loss to the plaintiff (damages).

Bailey v. Martz, 488 N.E.2d 716, 719 (Ind.App. 1986); *Fiddler v. Hobbs*, 475 N.E.2d 1172, 1173 (Ind.App. 1985).

To state a claim for attorney malpractice under Indiana law, a party must establish that there was a valid claim in the underlying action which was allegedly mishandled by the defendant attorney. 3 Ind.Law. Ency., *Attorney and Client*, Section 78. In other words, the client must show that the attorney's negligence proximately

caused the injury. *National Wrecking Company v. Spangler, Jennings, Spangler & Dougherty*, 782 F.2d 101, 104 (7th Cir. 1986); *Nave v. Baird*, 12 Ind. 318 (1859).

In *National Wrecking*, the plaintiff failed to establish a valid underlying cause of action and therefore failed to prove causation. Summary judgment in favor of the defendants was granted by the district court and affirmed on appeal. Moreover, the case of *Fiddler, supra*, presents a similar situation to the case at bar. In *Fiddler*, a dissatisfied divorce client brought an action against her attorney alleging negligence in representing her during the proceedings. Because the client could not prove causation, summary judgment in favor of the attorney was granted and affirmed by the Court of Appeals of Indiana.

The statutory obligation to divide marital assets requires the trial court to consider division of both assets and liabilities. *Hunter v. Hunter*, 498 N.E.2d 1278, 1293 (Ind.App. 1986); *Wells v. Wells*, 489 N.E.2d 972 (Ind.App. 1985). The trial court may use its sound discretion in applying the five statutory factors to divide assets and liabilities so as to minimize the impact of any one factor. *Hunter*, 498 N.E.2d at 1293; *In Re: Marriage of Rupp*, 449 N.E.2d 1164 (Ind.App. 1983). In arriving at a just and reasonable property disposition in a dissolution proceeding, the trial court need not affirmatively set out each statutory consideration affecting division and need not split the property equally. *Hunter*, 498 N.E.2d at 1293; *Baker v. Baker*, 488 N.E.2d 361 (Ind.App. 1986). Instead, the division of marital property is placed within the sound discretion of the trial court. *Hunter*, 498 N.E.2d at 1293.

Under Indiana law, there is a "strong presumption" that the trial court considered the statutory factors and properly applied them in its division of marital assets. *Hunter*, 498 N.E.2d at 1293; *Baker*, 488 N.E.2d at 365; *In Re: Marriage of Mulvihill*, 471 N.E.2d 10 (Ind.App. 1984). the party challenging the trial court's division of marital property bears the burden of overcoming this strong presumption. *Hunter*, 498 N.E.2d at 1293; *Temple v. Temple*, 435 N.E.2d 259 (Ind.App. 1982). The trial court's decision will be reversed "only where the result reached is clearly against the logic and effect of the facts and circumstances before the court. The fact that the evidence might support a different conclusion by the trial court does not permit us to substitute our judgment." *Rupp*, 449 N.E.2d at 1166 (citing *Taylor v. Taylor*, 436 N.E.2d 56 (Ind. 1982), and others).

On January 25, 1984, the trial court issued its order which states, in part:

> This hearing involved four long, difficult days of testimony with a stack of exhibits, with each of the parties spending a considerable amount of time attempting to prove that the other party was secreting assets. It would further appear to the Court that the parties were more interested in punishing the other party for the alleged wrongs they felt were committed against them in the marriage, rather than arriving at a fair and equitable settlement of the marital property. The Court finds from the testimony that said allegations of secreting assets are probably true as to both parties, but also finds that the assets secreted by each party were of equal value and is not a matter that the Court will consider in its final decision.

Petitioner's Appendix, (App. 50-51).

Upon a complete review of the underlying transcript, it is unquestionably clear that both Marcia and Edward used cash from the gas station receipts to make purchases and expenditures on their own behalf. (Tr. 302, 439). Although Marcia was employed as a teacher, she was given $600.00 cash per week ($31,200.00 per year) by Edward from gross receipts of the gas station for her own personal and household expenses. (Tr. 302, 439). Marcia acquired large quantities of clothing, expensive diamond jewelry and furs. The couple's federal income tax returns for the years of their marriage do not indicate a level of income that would permit them to net over $30,000.00 from the gas station business each year for personal and household expenses. *Jones*, 882 F.2d at 1278.

In 1979, Marcia considered the marriage in trouble. (Tr. 439). At about that time, Marcia was suspected of taking undisclosed amounts of cash from the gas station receipts. (Tr. 393). Soon thereafter, Edward asked Marcia to return all keys to the gas station. (Tr. 393, 436). Marcia also signed the 1979 federal income tax returns which showed income from the gas station at less than $6,000.00. (Tr. 442).

After the filing of the dissolution, Marcia sold, without Court approval, an organ for $3,000.00 which was a marital asset. (Tr. 526). She also located blank checks from the gas station account and secretly removed a few checks, which were approximately 300 checks ahead of those being currently used so as to avoid detection. (Tr. 434-436). She cashed some of these checks in the amount of $3,000.00. (Tr. 430-433). Two days after the dissolution action was filed, she withdrew $1,200.00 from her credit union savings account. (Tr. 424). The record reveals that

after the filing of divorce Marcia secreted assets in the amount of $7,200.00.

A. PETITIONER HAS FAILED TO REBUT THE PRESUMPTION UNDER INDIANA LAW THAT AN EQUAL DIVISION OF MARITAL PROPERTY IS JUST AND REASONABLE.

Allegations and counter-allegations were exchanged between the parties as to their spending conduct both prior to and after the filing of the petition for dissolution. The trial judge had the opportunity to observe both parties and found them to be bitter and acrimonious toward each other interested more in punishing one another than in aiding him in the equitable division of their property. The Court of Appeals of Indiana does not second guess a trial judge's weighing of the evidence. *Temple*, 435 N.E.2d at 262.

Under Indiana law, there is a presumption that an equal division of marital property between the parties is just and reasonable. Ind. Code §31-1-11.5-11(c). However, this presumption may be rebutted by a party who presents relevant evidence that an equal division would not be just and reasonable. Ind. Code §31-1-11.5-11(c). The party challenging the trial court's division of property bears the burden of proof in overcoming this presumption. *Hunter*, 498 N.E.2d at 1293; *Temple*, 435 N.E.2 at 260. Furthermore, the standard of review requires the reviewing court not to reweigh the evidence, and to consider only evidence and reasonable inferences most favorable to the appellee. *Baker*, 488 N.E.2d at 364; *Swinney v. Swinney*, 419 N.E.2d 996, 998 (Ind.App. 1981).

Upon review of the totality of the circumstances, the Seventh Circuit reasonably inferred that the money bags that were brought home by Edward consisted of cash receipts from the gas station. Marcia acknowledged that she received $600.00 cash per week from the gross receipts of the gas station for her own personal and household expenses. (Tr. 302, 439). The gas station business may have appeared to be thriving at one point, but the weekly withdrawals which gave the business an appearance of good health were actually a cancer that left the station over $80,000.00 in debt at the time of the dissolution. *Jones*, 882 F.2d at 1277. Marcia suggests that her unsupported claims regarding the extent and value of the money bags, speculative as it is, supports a different conclusion than that reached by the trial court. The fact that the evidence might support a different conclusion by the trial court does not permit the reviewing court to substitute its judgment. *Rupp*, 449 N.E.2d at 1166 (citing *Taylor*, 436 N.E.2d 56 (Ind. 1982) and others). Jones has failed to rebut the presumption that an equal division of assets is just and reasonable. Ind. Code §31-1-11.5-11(c).

The proper role of a trial court in dividing property is to review carefully all the evidence and then to divide the property based on a consideration of the statutory factors. *In Re: Marriage of Church*, 424 N.Ed.2d 1078, 1082, (Ind.App. 1981). There is no mandate that a trial judge dividing marital property in a dissolution proceeding state how and why he found and concluded the way he did. *Cornett v. Cornett*, 412 N.Ed.2d 1232, 1235 (Ind.App. 1980). The district court concluded that Marcia was awarded net marital assets valued at approximately $44,500.00. On the other hand, Edward was awarded net

marital assets of $43,000.00. See Respondent's Appendix (App. 10). In the end, the Indiana trial judge made a virtually equal division of those net marital assets that he could clearly identify and value from four days of testimony. This virtual equal division of net marital assets remains unchallenged by the petitioner. Given the presumption under Indiana law that an equal division of marital property is just and reasonable, it cannot be said that the trial court abused its discretion in finding that both parties probably secreted assets of equal value.

B. PETITIONER HAS FAILED TO REBUT THE PRESUMPTION UNDER INDIANA LAW THAT THE TRIAL COURT CONSIDERED AND APPLIED THE FIVE STATUTORY FACTORS FOR DIVISION OF MARITAL PROPERTY.

The Indiana appellate court reviews property distribution decisions under an abuse of discretion standard. *Hunter,* 498 N.E.2d at 1293; *Rupp,* 449 N.E.2d at 1166. On review, the appellate court does not reweigh the evidence and considers only that evidence, and reasonable inferences therefrom, that is most favorable to the appellee. *Rupp,* 449 N.E.2d at 1166. There is a presumption under Indiana law that the trial court properly applied these factors when dividing marital property. *Id.; Baker,* 488 N.E.2d at 365; *Mulvihill,* 471 N.E.2d at 13. The party challenging the trial court's division of property bears the burden of proof in overcoming this presumption. *Hunter,* 498 N.E.2d at 1293; *Temple,* 435 N.E.2d at 260.

Given this presumption, petitioner asserts that the trial court failed to consider disposition of assets during

the course of the marriage. It is important to note the context in which the trial court made a statement after four days of testimony. The trial court stated:

> I've heard going on four days of testimony, and what I have to do is try to sort out something which probably boils down to about an hour of testimony. [W]hat I've gotta do is divide up these parties' marital, marital property, and what they've spent or what they've disposed of during the course of their marriage is, is really not relevant.

(Tr. 585).

In addition to the presumption afforded to a trial court that it considered and applied the five statutory factors, the district court made an independent review of the record and specifically found that the trial court considered and applied all five statutory factors. Respondent's Appendix (App. 10-11). The independent examination and determination by the district court continues to remain unchallenged by the petitioner. As stated by the circuit court:

> We are left finally with only two issues that merit discussion: the trial court's conclusion that both parties in the Joneses' divorce had secreted marital assets and the judge's determination that the secreted assets were of equal value. This second conclusion permitted the judge to ignore the parties' allegations of concealment and dissipation of assets and get down to the business of dividing up what they were in fact able to prove existed.

Jones, 882 F.2d at 1283.

The circuit court correctly interpreted the trial court's comment on the fourth day of testimony that the trial

court, at that point in time, was more interested in identifying and valuing existing marital assets and liabilities. This is further evidenced by the trial court's order of January 25, 1984, which stated:

> This hearing involved four long difficult days of testimony with a stack of exhibits, with each of the parties spending a considerable amount of time attempting to prove the other party was secreting assets. It would further appear to the Court that the parties were more interested in punishing the other for the alleged wrongs they felt were committed against them in the marriage, rather than arriving at a fair and equitable settlement of the marital property.

Petitioner's Appendix (App. 50-51).

Petitioner asserts that failure to consider one of the required statutory factors, especially when complicated by a difficult factual record, requires a retrial, citing *In Re: Marriage of Salas*, 447 N.E.2d 1176, 1181 (Ind.App. 1983). Petitioner's reliance on this case is misplaced. In *Salas*, the trial court failed to consider the parties' debts when it awarded the wife a judgment in excess of the marital estate. Moreover, review of the record was complicated by the lack of an intelligible record due to mechanical failures during the proceedings coupled with the fact that English was not the native language of either party. The trial court specifically stated that its reversal was not due to the excessive award but rather the lack of an intelligible record prohibiting review of the evaluation of the marital estate. *Salas*, 447 N.E.2d at 1181.

Since there was an insufficient record to review the trial court's findings and noting that the trial court failed to consider the parties' debt when it issued its award,

reversal was required based on the specific facts in that case. In the case at bar, the facts are completely different and distinguishable. Here, the trial court allowed four long days of testimony in which each party was allowed to testify as to identity and value of assets and liabilities. In this case, there was no language barrier, problem with the record on appeal or lack of debt distribution by the trial court and therefore *Salas* is inapplicable.

Petitioner continues to assert that the American Surgery Center stock was improperly valued. The trial court found that the value of the stock was $937.00. The undisputed evidence indicates that 250 shares of the stock were purchased at 4⅛ and 500 shares were later purchased at 2. (Tr. 217). The value of the stock continued to drop. On February 9, 1982, the date of valuation, the stock was valued at 1⅛ to 1¼ per share according to the Wall Street Journal. (Tr. 709). The top value of the stock on February 9, 1982, as found by the trial court is $937.00 (750 shares X 1¼ = $937.50).

Under Indiana law, the court shall divide the marital property of the parties, whether owned prior to or acquired after the marriage and prior to final separation of the parties. Ind. Code §31-1-11.5-11(b). For the purposes of this statutory section "final separation" means the date of filing the petition for dissolution of marriage. Ind. Code §31-1-11.5-11(a). The Seventh Circuit correctly held that under Indiana law the value of a marital asset or liability is to be measured at the time of the filing of the petition for dissolution, February 9, 1982.

The value of any asset or liability can change from day to day. A stock's value can fluctuate dramatically in

either direction. The trial court must have a date certain on which all assets and liabilities are to be fixed and assigned a value. Thus, all assets and liabilities are treated equally by the trial court without focus on any one over another.

Finally, in passing, the petitioner argues that the Seventh Circuit may have applied the wrong test. In doing so petitioner picks one sentence out of an entire paragraph wherein the Seventh Circuit was analyzing its role in the case and reached the correct conclusion that its task was to place itself "in the shoes of an Indiana appellate court." *Jones*, 882 F.2d 1282. Further, the proposition that the Indiana appellate court could have remanded the case to the trial court so that additional evidence could be submitted has been waived. A party who fails to introduce evidence as to the value of the marital property is estopped from appealing the property distribution due to absence of evidence. *Salas*, 447 N.E.2d at 1181; *Church*, *supra*.

The trial court judge had the best opportunity to observe the demeanor and determine the credibility of each party. The record in this case is lengthy and consists of four days of conflicting testimony. The trial court had the monumental task of deciding which witnesses were credible, which assets and liabilities existed on February 9, 1982, which value should be assigned to the debts and assets, and what distribution of marital assets and debts would be just and reasonable under the circumstances.

The essence of this case is that prior to the marriage, Edward owned a gas station business and Marcia was a teacher. During the marriage, the parties spent in excess of their means and incurred substantial debt on behalf

of the gas station business to the point where the business was losing money in 1981 and the husband owed substantial back taxes. The trial court was not obligated to find the gas station business a marital asset since it was acquired by Edward prior to the marriage, but did so. The trial court awarded the floundering gas station business to the husband along with all business debts and associated tax problems which may include penalties. The wife was awarded the marital home and the new car.

Upon review of all the circumstances in this case, Marcia Jones has failed to establish two essential elements – proximate cause and damages – in order to set forth a *prima facie* case. Marcia has also failed to establish that the trial court abused its discretion in awarding virtually equal amounts of net marital assets to each party of the dissolution. Marcia has further failed to establish that the district judge erred in granting summary judgment in favor of Psmios which was affirmed on appeal. As stated by the district court:

> This Court has painstakingly reviewed the voluminous record in this case, and concludes that the gravamen of Marcia's Complaint is unsupported allegations about the existence and value of certain marital assets. Despite *many* opportunities and this Court's express directive that Marcia support these allegations with references to the transcript or other documentation, she has been unable to prove up her assertions.

Respondent's Appendix (App. 11-12).

IV. PETITIONER HAS NOT RAISED A SUBSTANTIAL FEDERAL QUESTION.

The issues raised by the petitioner do not merit review by this Court. A petition for writ of certiorari will be

granted only when there are special and important reasons therefor. Sup.Ct.R. 10.1. The petitioner has failed to set forth any ground upon which this court should exercise its discretionary power of review.

The Jasper Circuit Court order dated January 25, 1984, has been reviewed and approved at four separate judicial levels: the trial court denied post judgment motions on April 16, 1984; the district court granted summary judgment in favor of the respondent on August 18, 1988; the circuit court affirmed the district court's granting of summary judgment in favor of the respondent on August 21, 1989; and the circuit court denied rehearing on September 26, 1989. The decision by the United States Court of Appeals for the Seventh Circuit correctly determined that the petitioner failed to establish a *prima facie* case for attorney malpractice at the appellate level under Indiana law and that the district court therefore did not err in granting respondent's motion for summary judgment. Petitioner has not raised a substantial federal question which would merit review by this Court.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MARCIA JONES,
Plaintiff,
v.
HARRY PSIMOS,
Defendant,
No. H84-755

****

HARRY PSIMOS,
Counter-Claimant,
v.
MARCIA JONES,
Counter-Defendant.

FILED
AUG 18 1988

ORDER

Presently before this Court is the Defendant's (hereafter Psimos) Motion for Summary Judgment, arising out of Plaintiff's claim of legal malpractice. The origin of this case is the divorce proceedings between Marcia and Edward L. Jones. A dissolution of marriage was entered in Lake Superior Court under Case No. 382-192. The issue of property distribution was reserved for a later time.

On November 23, 1982, Jasper Circuit Court Judge Daugherty entered an order dissolving the marriage. Thereafter, the parties conducted discovery with regard to the issue of property distribution. The Court held a hearing on the issue of property distribution and testimony was presented for four days in the Summer of 1983.

On January 25, 1984, Judge Daugherty entered an order distributing the marital assets.

Subsequent to January 25, 1984 and pursuant to the request of Marcia, Psimos filed a motion to correct errors. This motion was denied on April 16, 1984. Thereafter, Psimos filed a Praecipe to initiate an appeal of Judge Daugherty's decision. A pre-appeal statement and other relevant pleadings were not timely filed and the Court of Appeals dismissed the case. Subsequent efforts to reinstate the appeal were fruitless.

Several lawsuits were filed by Marcia as a result of the divorce proceedings, in addition to the one presently before the Court. However, it is the Court's opinion that these previous proceedings are not relevant to this Court's resolution of the issue before it.

In relevant part, the Complaint alleges that Psimos was employed to appeal Judge Daugherty's order of property distribution. In violation of his duty to timely proceed with this appeal, Psimos failed to file the requisite documents and the case was dismissed. Specifically, the Complaint alleges:

> "5. In violation of his duty to the plaintiff, the defendant, Harry Psimos, failed to file the required documents within the time permitted, and thereby forfeited the plaintiff's right to appeal. This failure was negligent, in breach of contract with his client, the plaintiff to protect her rights on appeal, and not in accordance with the standard for the practice of law in Indiana.
>
> 6. As a result of the defendant's misconduct, as aforesaid, the plaintiff has been damaged by not having the opportunity of having the court of

> appeals review the judgment of the Jasper Circuit Court which awarded substantial property to her former husband. The plaintiff has been damaged in the approximate amount of $800,000."

Under Indiana law, in order for a plaintiff to succeed on a claim for attorney negligence or legal malpractice, the plaintiff must prove: (1) employment of the attorney (the duty); (2) failure of the attorney to exercise ordinary skill and knowledge (the breach), which (3) proximately causes; (4) loss to plaintiff (damages). *Bailey v. Martz*, 488 N.E.2d 716, 719 (Ind. App. 1986); *Fiddler v. Hobbs*, 475 N.E.2d 1172, 1173 (Ind. App. 1985). Psimos directs this Court to an excerpt from R.E. Mallen and V.B. Levit, *Legal Malpractice*, 2d, the Appellate Attorney, §583, pp. 738-740 which states:

> "*CAUSATION*. The most common issue concerning an error in handling an appeal is whether the attorney's negligence caused damage. Initially, the client must prove that but for the attorney's negligence, the plaintiff would have prevailed on appeal. (Citations omitted)."

The passage goes on to discuss that the reviewing judge must determine what an appellate court would have done upon review of the underlying action, if the attorney's negligence had not precluded this review. It is noted that this decision must be made by a trial judge "as an issue of law, based upon review of the transcript and record of the underlying action, the argument of counsel, and subject to the same rules of review as should have been applied by the appellate court." (Citation omitted).

> " . . . Even if the appeal would have been successful, the plaintiff *must* next prove that he would have achieved a better result. (Citations

> omitted). This burden will be satisfied if the appeal itself would have resulted in a judgment in the client's favor without the need for a retrial. If a retrial is the end result of appellate review, however, then the client must next persuade the trier of fact that he would have done better upon a new trial. (Citation omitted). There must be a compensable injury since negligence of that damage is not actionable. (Citation omitted)."

In *National Wrecking Company v. Spangler, Jennings, Spangler, and Dougherty*, 782 F.2d 101 (7th Cir. 1986), the Seventh Circuit stated:

> "To state a claim for attorney malpractice under Indiana law, a party *must* establish that there was a valid claim in the underlying action which was allegedly mishandled by the defendant attorney. 3 *Ind. Law Ency. Attorney and Client*, §78. In other words, the client *must show that the attorney's negligence proximately caused the injury.* (Emphasis added)."

The first issue for this Court to address is whether the decision of Judge Daugherty concerning marital property distribution would have been reversed on appeal. The trial court has discretionary power concerning the division of marital property. *Baker v. Baker*, 488 N.E.2d 361 (Ind. App. 1986); *Planert v. Planert*, 478 N.E.2d 1251 (Ind. App. 1985). As the Indiana Appellate Court stated in *Baker*:

> "It is only the abuse of such discretion which is reviewable on appeal. The presumption in favor of the correct action of the trial court is one of the strongest presumptions applicable to the considerations of a case on appeal. *Temple v. Temple*, 164 Ind. App. 215, 328 N.E.2d 227, 223 (Ind. App. 1975).

> The trial court action will not be reversed for an abuse of discretion unless there is shown to have been an erroneous conclusion in judgment clearly against the logic of the facts and circumstances and the deductions to be drawn therefrom. *York v. York*, 472 N.E.2d 1308, 1309 (Ind. App. 1985). Furthermore, our standard of review requires us not to reweigh the evidence, and to consider only the evidence and reasonable inferences most favorable to the appellee. *Swinney v. Swinney*, 419 N.E.2d 996, 998 (1981)."

Thus, it is clear that this Court must evaluate whether the trial court abused its discretion in distributing the marital assets in the Jones proceedings. The trial court is required under Indiana Code 31-1-11.5-11 to divide the property of the parties in a just and reasonable manner taking into consideration the following factors set forth in 31-1-11.5-11(c): (1) the contribution of each spouse to the acquisition of the property, including contribution of a spouse as homemaker; (2) the extent to which the property was acquired by each spouse prior to marriage or through inheritance or gifts; (3) the economic circumstances of each spouse at the time of the disposition of the property is to be effective, including the desirability of awarding the family residence or the right to dwell in that residence for such periods as the court may deem just to the spouse having custody of any children; (4) the conduct of the parties during the marriage as related to the disposition or dissipation of their property; and (5) the earnings or earning ability of the parties as related to a final division of the property and final determination of the property rights of the parties.

Employing these considerations, the trial judge must weigh the evidence of the contributions by the parties

and the assets presented in the record. The court in *Baker* stated that there is a strong presumption that the trial court considered the statutory factors found in 31-1-11.5-11(c) and properly applied them to its division of marital property assets. *Baker v. Baker,* 488 N.E.2d 361, 365 (Ind. App. 1986).

In the present case, there are voluminous transcripts and several affidavits in the record. A review of the entire record establishes that during the four days of testimony heard by Judge Daugherty, evidence on the following matters was presented to the court: (1) business statistics of the Jones' Shell station; (2) appraisal of the family home (two appraisals were submitted to the court, one by each party); (3) appraisal of personal property within the home; (4) appraisal of an organ; (5) appraisal of the business property, i.e., equipment; (6) federal tax returns and tax related information; (7) a business operating statement; (8) W-2 Forms for Marcia; (9) checks written to Marcia on the Shell account; (10) numerous Merrill Lynch account statements concerning a commodity account, which included information concerning treasury bills, ready assets trust, security account; (11) checks purchased at the Gary National Bank, which related to trading in the Merrill Lynch accounts; (12) J.W.J.T. Inc. account statement; (13) statement from Bache-Heilsey Stewart Shield Inc. commodity account; (14) monthly budget and bills owing and paid in February of 1982; (15) Town and Country charge statements; (16) Marcia's credit union account; (17) silverware and china owned by the Jones; (18) art work purchased; (19) several account statements from Marcus Jewelers; (20) account statement from

Evans, women's clothing store; (21) statements concerning Marcia's earnings and deductions re Lincoln School employment; (22) Prudential insurance policy; (23) trips and vacations; (24) gifts to other women by Edward; (25) mortgage records; (26) monthly expenditures before separation; (27) bank records from the First National Bank of East Chicago; (28) account statements from Lane Bryant; and (29) Shell production account.

In Judge Daugherty's order, he begins by addressing the obvious attempt of the parties to "punis[h] the other party for the alleged wrongs they felt were committed against them in the marriage, rather than arriving at a fair and equitable settlement of the marital property." Judge Daugherty found from the testimony that the allegations of secreting assets were probably true as to both parties, and that the assets secreted by each party were of equal value and was not a matter that the court would consider in its final decision.

Judge Daugherty went on to identify and discuss the fact that the Shell business had business debts in excess of $82,000, which most notably included unremitted taxes to the State of Indiana exceeding $40,000. Further, Judge Daugherty considered the family home, and used Marcia's appraisal as the value of that property, household furniture and furnishings in the residence, personal property, family automobiles, American Surgeries Center common stock, Marcia's jewelry, and Edward's jewelry.

Judge Daugherty found that the Shell business should be considered a marital asset, in light of Marcia's contributions to the business during the marriage, and valued the business at $110,000. The court identified the

parties' debts incurred during marriage to include: (1) mortgage on the family home; (2) business debts of the Shall station; (3) personal debts incurred by Edward; (4) personal debts incurred by Marcia; and (5) Marcia's debt to her credit union.

In the final dissolution of the property, Judge Daugherty ordered that Marcia be awarded: (1) the family residence; (2) a 1981 Mazda automobile; (3) her jewelry; (4) one-half of the household furniture and furnishings, to be divided as provided for in his order. He further found that Marcia would assume the following debts: (1) the mortgage on the family home and all other debts or liens relating to the real estate, such as taxes; (2) any and all debts owing to her credit union; (3) Marcus Jewelers; (4) Lane Bryant; (5) John M. Smith; (6) L.S. Ayres; and (7) any and all other debts incurred by her, but not specifically ordered paid by the husband.

Judge Daugherty found that Edward would be awarded: (1) the Shell service station business and all accounts related thereto; (2) all personal property related to the filling station business, to include tools, equipment, and inventory; (3) American Surgery Center stock; (4) Edward's jewelry; (5) 1973 Lincoln automobile; (6) one-half of the household furniture and furnishings, to be divided as hereinafter stated; (7) all shares of stock in J.W.J.T. Inc.; (8) all interest in a Merrill Lynch ready account; (9) Watkin's account; (10) commodity account and gainer account numbers 540-5749 and 540-5736. The court further found and ordered that Edward would assume the following debts: (1) the Shell service station; (2) personal debts incurred by Edward, including Visa, Mastercharge, TWA, United Airlines, Sears, J.C. Penny, Evans,

and American Express, and any other debts incurred by him and not specifically ordered paid by Marcia.

Lastly, the court found that neither party was without the money or means to employ counsel and that each would be responsible for paying their own attorney fees.

Keeping in mind that the standard by which this Court must review Judge Daugherty's decision is limited to the issue of whether he abused his discretion in distributing the marital assets, it appears that this issue must be answered in the negative. With the values available, a mathematical analysis of the distribution of assets and liabilities to Marcia and Edward appears to establish almost a 50-50 distribution. According to the Court's analysis, Marcia was assigned approximately $91,400 in assets and approximately $46,900 in liabilities. Thus, Marcia was awarded net assets of approximately $44,500.

As to Edward's share of the property distribution, the Court concedes that the distribution is less clear, but certainly resolvable. It is correct that Judge Daugherty's decision does not reflect the value that he assigned to certain of Edward's assets, including: shares of stock in J.W.J.T. Inc., an interest in a Merrill Lynch ready account, Watkin's account, commodity account, and gainer account numbers 540-5749 and 540-5736. However, despite her numerous unsupported allegations about the value of these assets, the Plaintiff has been unable to produce any evidence about their value.

The Court has sifted through the many pages of the transcript in this case, and has also been unable to find any evidence regarding the value of the above identified

assets at the time of marital dissolution. The Court therefore assumes that the trial judge found that if after a four day hearing on the matter no evidence as to these assets' value was produced, these assets were of nominal value or did not exist at all in some cases.

A review of the record in this case establishes that Judge Daugherty undertook the Jones' property distribution task with great diligence. Thus, this Court finds that the record establishes that the value of Edward's assets not expressly valued by Judge Daugherty in his opinion were at best of nominal value.

The value of the total assets assigned Edward is $132,800, excluding the value of the items discussed above. The value of the total liabilities assigned to Edward is $89,800. Thus, Edward was awarded net assets of approximately $43,000. To compare, Marcia was awarded approximately $44,500, and Edward $43,000.

Further, it is evident that Judge Daugherty considered the relevant factors identified by the Indiana Appellate Court for distributing marital assets. In Judge Daugherty's opinion (page 3, ¶9), he makes a finding that the Shell station business, although acquired prior to marriage, should be deemed a marital asset in light of Marcia's contribution to its development and increase in value during the marriage. (See 31-1-11.5-11(c)(1)). Secondly, Judge Daugherty considered the economic circumstances of the parties (opinion, page 2, ¶¶1, 4, 6, and 7), including a finding that both Marcia and Edward were employed and continued to be employed, and that there were no children born of the marriage. 31-1-11.5-11(c)(3).

Third, Judge Daugherty made a finding on page 1 of his opinion as to Marcia's and Edward's conduct regarding the disposition or dissipation of their property during marriage. In this finding, Judge Daugherty stated that he found both parties to be guilty of secreting assets, although he opined that the assets secreted were of equal value, and therefore, would not be considered in the disposition of marital property. (See 31-1-11.5-11(c)(4)).

Additionally, Judge Daugherty made findings as to the parties' earnings and earning capabilities. Judge Daugherty, in his opinion on page 2, ¶¶6 and 7, and page 5, ¶16, found that both parties were employed and capable of paying their own attorneys' fees. See 31-1-11.5-11(c)(5).

The only factor set forth in 31-1-11.5-11(c) that Judge Daugherty did not make a specific finding regarding is "the extent to which the property was acquired by each spouse prior to marriage or through inheritance or gift." It appears from the record that there was no property in question which fell within this category.

For the reasons previously set forth, it is the Court's opinion that if the Appellate Court had not dismissed Marcia's case, it would have affirmed the findings of the trial court. There is nothing in the record which could lead this Court to conclude that, in distributing Marcia's and Edward's marital assets, Judge Daugherty abused his discretion.

This Court has painstakingly reviewed the voluminous record in this case, and concludes that the gravamen of Marcia's Complaint is unsupported allegations about the existence and value of certain marital assets. Despite

many opportunities and this Court's express directive that Marcia support these allegations with references to the transcript or other documentation, she has been unable to prove up her assertions.

In an affidavit, Marcia states that the actual division of property by Judge Daugherty was 70% to Edward and 30% to her, in light of the fact that Judge Daugherty refused to consider the assets allegedly secreted by the parties. (Marcia Jones affidavit, ¶4). Further, she attests that Judge Daugherty failed to consider numerous assets, and that said failure constitutes an abuse of discretion. She identifies these assets to include: cashiers checks totaling $185,823.45; 17 treasury bills valued at $10,000 each; a four-way liquor license number 450154; a $40,000 certificate of deposit at the Gainer Bank; a land trust of substantial value at 1101 Taft Street, Gary, Indiana; real estate located at 25th and Chase Streets in Gary, Indiana; a one-quarter interest in J.W.J.T. Corporation; and a one-half interest in the $27,000 in the Merrill Lynch account of Willie Watkins. (Marcia Jones affidavit, ¶5).

Further, Marcia asserts that the Shell service station was undervalued. She states that almost $50,000 in assets derived from a Merrill Lynch ready trust, a Bache account, Merrill Lynch commodities account, and Jones' Shell commercial accounts were never accounted for in the divorce proceedings because subsequent to these assets being frozen by court order, they were made available to Edward and unaccounted for at the hearing. (Marcia Jones affidavit, ¶8).

This Court has been very lenient with Marcia, allowing her every opportunity to support her 70%/30% property distribution assertion. However, there is an end to patience. There is no evidence in the record to support these assertions, nor, in the Court's opinion, is any such evidence expected to be forthcoming.

For the reasons set forth in this opinion, the Court finds that Judge Daugherty did not abuse his discretion when distributing Marcia's and Edward's marital property. Therefore, his decision would have been affirmed on appeal.

Of the four elements which must be sustained under Indiana law in order for a plaintiff to succeed on a claim for legal malpractice, causation is the primary and critical element of contention in this case. In the absence of Marcia being able to show that but for her attorney's negligence, the resolution of her case would have been more favorable to her, it is impossible for her to sustain a claim for legal malpractice under Indiana law.

Therefore, the Court GRANTS the Defendant's Motion for Summary Judgment. The United States Clerk of the District Court for the Central District of Illinois is directed to enter judgment in favor of the Defendant.

ENTERED: This 18th day of August, 1988.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

Ind. Code § 31-1-11.5-11
Disposition of property; maintenance

(a) For purposes of this section, "final separation" means the date of filing of the petition for dissolution of marriage under section 3 of this chapter.

However, if:

(1) a legal separation proceeding involving the parties was pending when the petition for dissolution of marriage under section 3 of this chapter was filed; or

(2) a provisional order or final decree for legal separation of the parties was in effect when the petition for dissolution of marriage under section 3 of this chapter was filed;

the term means the date that the petition for legal separation was filed under section 3 of this chapter.

(b) In an action pursuant to section 3(a) of this chapter, the court shall divide the property of the parties, whether owned by either spouse prior to the marriage, acquired by either spouse in his or her own right after the marriage and prior to final separation of the parties, or acquired by their joint efforts, in a just and reasonable manner, by:

(1) division of the property in kind;

(2) setting the property or parts of it over to one (1) of the spouses and requiring either spouse to pay such sum, either in gross or in installments, as may be just and proper;

(3) ordering the sale of the property under such conditions as the court may prescribe and dividing the proceeds of the sale; or

(4) ordering the distribution of any benefits described in section 2(d)(2) or 2(d)(3) of this chapter that are payable after the dissolution of

marriage, by setting aside to either of the parties a percentage of those payments either by assignment or in kind at the time of receipt.

(c) The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

(1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.

(2) The extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift.

(3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in that residence for such periods as the court may deem just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

(d) When the court finds there is little or no marital property, it may award either spouse a money judgment not limited to the property existing at the time of final separation. However, this award may be made only for

the financial contribution of one (1) spouse toward tuition, books, and laboratory fees for the higher education of the other spouse.

(e) A court may make the following findings concerning maintenance:

(1) If the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself is materially affected, the court may find that maintenance for that spouse is necessary during the period of incapacity, subject to further order of the court.

(2) If the court finds a spouse lacks sufficient property, including marital property apportioned to that spouse, to provide for that spouse's needs and that spouse is the custodian of a child whose physical or mental incapacity requires the custodian to forego employment, the court may find that maintenance is necessary for that spouse in an amount and for a period of time as the court deems appropriate.

(3) After considering:

(A) the educational level of each spouse at the time of marriage and at the time the action is commenced;

(B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of homemaking or child care responsibilities, or both;

(C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market; and

> (D) the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment;

a court may find that rehabilitative maintenance for the spouse seeking maintenance is necessary in an amount and for a period of time that the court considers appropriate, but not to exceed three (3) years from the date of the final decree.

Ind. Code § 31-1-11.5-11 (1988)